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# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 223

~~THE UNITED STATES OF AMERICA~~, INTERSTATE  
COMMERCE COMMISSION, AND THE PACIFIC ELECTRIC  
RAILWAY COMPANY, APPELLANTS

vs.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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FILED JUNE 28, 1941

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A [Caption omitted.]

1 In the United States District Court for the District  
of Columbia

Civil Action No. 9011

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AND BROTHERHOOD OF  
RAILROAD TRAINMEN, 10 INDEPENDENCE AVE. SW., WASHINGTON,  
D. C., PLAINTIFFS,

vs.

UNITED STATES OF AMERICA; AND INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS

*Complaint*

Filed Nov. 8, 1940

Now come the plaintiffs and for their cause of action say:

1

The plaintiff Railway Labor Executives' Association, is a voluntary unincorporated association composed of the following standard international railway labor organizations:

- Brotherhood of Locomotive Engineers.
- Brotherhood of Locomotive Firemen and Enginemen.
- Order of Railway Conductors of America.
- Switchmen's Union of North America.
- Order of Railroad Telegraphers.
- American Train Dispatchers' Association.
- Railway Employees' Department, A. F. of L.
- International Association of Machinists.
- International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America.
- International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
- Sheet Metal Workers' International Association.
- International Brotherhood of Electrical Workers.
- Brotherhood of Railway Carmen of America.
- International Brotherhood of Firemen and Oilers.
- Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.
- Brotherhood of Maintenance-of-Way Employees.
- Brotherhood of Railroad Signalmen of America.

2 UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N

National Organization Masters, Mates, and Pilots of America.  
National Marine Engineers Beneficial Association.  
International Longshoremen's Association.

Order of Sleeping Car Conductors.

2 that said standard international railway labor organizations in turn represent approximately one million railroad employees, among which are employees of the Pacific Electric Railway Company. The principal office of the petitioner Railway Labor Executives' Association is located at 10 Independence Avenue SW., Washington, D. C.

Certain of the organizations comprising said petitioner Railway Labor Executives' Association have agreements with the Pacific Electric Railway Company concerning the rates of pay, rules, and working conditions of the various crafts or classes of employees on said railroad and are duly authorized to represent such employees in this proceeding.

Plaintiff Brotherhood of Railroad Trainmen is an unincorporated association and a standard international railway labor organization including in its membership railroad brakemen and certain other train service employees and has an agreement with the Pacific Electric Railway Company concerning the rates of pay, rules, and working conditions of such employees on the property of the said Company.

By virtue of the foregoing, the plaintiffs herein represent the interests of the employees of the Pacific Electric Railway Company and this action is brought for and in behalf of the said employees.

2

The defendant Interstate Commerce Commission is an independent agency in the executive branch of the government of the United States created by a statute of the United States known as the Interstate Commerce Act, its powers being subject to the provisions of the said Act as originally enacted and as amended from time to time.

3

3

The Pacific Electric Railway Company is a corporation operating extensive electric railroad and motorbus and truck lines in and in the vicinity of the city of Los Angeles, California. It is a wholly owned subsidiary of the Southern Pacific Railroad Company with whose lines it makes connections at numerous points. It is a common carrier by railroad and handles a large volume of traffic, both passenger and freight, local and interstate.

4

Prior to November 13, 1939, the management of the Pacific Electric Railway Company drew up a comprehensive plan for increasing the profits of the operations of that company. The said plan contemplated the abandonment of certain of the railroad lines of the company and arrangements for the handling of the traffic either through the rehabilitation of other rail lines serving the same territory or through the substitution of motorbus and motor-truck service. The said plan did not contemplate the withdrawal of the Pacific Electric Railway Company from any considerable traffic area theretofore served by it.

5

Pursuant to the plan aforesaid, and on the 13th day of November 1939, said Pacific Electric Railway Company acting under and by virtue of Section 1, para. 18, 19, and 20 of the Interstate Commerce Act (U. S. C. Tit. 49, Sec. 1 (18-20)), applied to the defendant Interstate Commerce Commission for a certificate of public convenience and necessity authorizing it to abandon certain of its  
4 lines of railroad in Los Angeles, Orange, and Riverside Counties, California. The defendant Interstate Commerce Commission accepted jurisdiction over the said application and assigned to it Finance Docket No. 12643.

6

In the event that the proposed abandonment is consummated, the applicant, its parent company the Southern Pacific Railroad Company, and its security holders, will experience a net gain of approximately \$378,229.00 annually in connection with applicant's operations, while applicant's employees will experience a net wage loss to the extent of approximately \$301,896.10 annually. The exact number and identity of the employees who will lose their employment and their means of livelihood if the proposed abandonment is consummated is unknown to the plaintiffs who believe and allege, however, that the number will be considerable in relation to the total employment of the Pacific Electric Railway Company.

Many of the said employees have devoted a large portion of their productive lives to the service of the Pacific Electric Railway Company and have acquired valuable property rights of seniority in connection with their employment. Many of the said employees are and will be unable to secure other employment in the event of their dismissal by the Pacific Electric Railway Company, will suffer great hardship by reason thereof, and will become public charges.

Uncertainty as to their economic future has subjected labor relations between these employees and the Pacific Electric Railway Company to severe stress which uncertainty and stress have been communicated to other employees of this carrier on other lines not affected by this application, from all of which impairment of employees' morale has resulted. All of the above vitally affects the interests, convenience, and necessity of the public in the premises.

7

Section 1, para. 20, of the Interstate Commerce Act, provides in part as follows:

"The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise of only such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

Under and by virtue of the foregoing statutory provision a reasonable discretion is given to the defendant Interstate Commerce Commission in the matter of the granting or withholding of a certificate of public convenience and necessity and in the matter of attaching conditions to a certificate granted. In the exercise of its said discretion, the defendant Interstate Commerce Commission is directed by the statute to consider any and all phases of the convenience and necessity of the public which may be relevant to the case at hand.

By virtue of the said statutory provision, the plaintiffs and the employees represented by them, became vested of the legal right to appear before the defendant Interstate Commerce Commission as members of the public and as persons or the representatives of persons likely to be affected by the abandonment proposed and to present for the consideration of the Commission evidence and arguments concerning the reaction of that effect upon the general convenience and necessity of the public.

8

On the 13th and 14th days of March 1940, the application filed by the Pacific Electric Railway Company as aforesaid was duly set down for hearing before an official of the defendant Interstate Commerce Commission duly empowered to act as trial examiner in this case. At the said hearing, the plaintiffs herein duly appeared as protestants representing the interests of the employees of the applicant. They have participated in all



subsequent proceedings before the defendant Interstate Commerce Commission and have duly and fully asserted to said defendant their legal right as above set forth. In particular these plaintiffs have urged the defendant Interstate Commerce Commission to attach to any certificate of public convenience and necessity which it might issue conditions designed to minimize the effect upon the employees of the abandonment proposed through a provision for a graduated scale of unemployment allowances to be paid out of the savings realized by the Pacific Electric Railway Company from its proposed plan for the rearrangement of its properties. A copy of the specific conditions suggested is hereto attached, marked Exhibit A and made a part hereof.

9

The defendant Interstate Commerce Commission, speaking through Division 4 thereof, duly considered the application of the Pacific Electric Railway Company and issued an order granting the same. It refused, however, to attach to its certificate any conditions for the protection of employees of the applicant such as those suggested to it by the plaintiffs or any others, or to give any consideration to the interests of the employees of the applicant or the effect of the abandonment upon them. The defendant Interstate Commerce Commission did not predicate its ruling upon any finding to the effect that the conditions proposed by these plaintiffs were in themselves unfair, economically unjustified or unfitted to the case at hand, but rather upon the erroneous conclusion that the language of the Interstate Commerce

Act gives to the Interstate Commerce Commission no authority to impose such conditions in abandonment cases or to give any consideration to the effect of abandonment upon employees. It therefore ruled that under no circumstances and in no case involving the abandonment of all or any portion of a line of railroad could it consider any effect thereof upon employees as a phase of the convenience and necessity of the public.

Copy of the report of the Examiner of the Interstate Commerce Commission is attached hereto, marked Exhibit B and made a part hereof. A copy of the decision and order of Division 4 is attached hereto, marked Exhibit C and made a part hereof.

10

This ruling and decision of the defendant Interstate Commerce Commission is erroneous and the order and certificate based thereon are likewise erroneous and should be set aside.

The said ruling and decision of the defendant Interstate Commerce Commission will deprive the plaintiffs and the employees of the Pacific Electric Railway Company whose interests plaintiffs represent, of the enjoyment of valuable property rights in their employment as above described. The said plaintiffs and the employees represented have the further right to appear before the defendant Interstate Commerce Commission in any proceeding involving the abandonment of railroad trackage and protect their property rights aforesaid and to advance evidence showing the effect of the destruction of such rights upon the convenience and necessity of the public. The order of the defendant Interstate Commerce Commission aforesaid denies to the plaintiffs and to the said employees the enjoyment of this right by holding that in no case and under no circumstances can the effect of the abandonment of railroad trackage upon employees be considered in relation to the convenience and necessity of the public.

These plaintiffs and the employees of the Pacific Electric Railway Company represented by them, are threatened with irreparable injury on account of the erroneous order of the defendant Interstate Commerce Commission in that they are subject to the loss of position, compensation, rights of seniority and other valuable property rights if the rail lines mentioned in the application of the Pacific Electric Railway Company are abandoned, in a proceeding wherein they were denied all opportunity to present the effect of their loss in relation to the public convenience and necessity. For this injury the plaintiffs and those represented by them have no remedy save by this action. They have pursued their administrative remedy before the defendant Interstate Commerce Commission to the extent of applying for a rehearing and reargument before the full Commission which rehearing and reargument has been refused. The plaintiffs and those represented by them have no remedy at law in the premises by action for damages or otherwise, and no other remedy whatsoever save by complaint to this Court.

Wherefore the plaintiffs pray:

First, that the Court wholly suspend the operation of the order of the defendant Interstate Commerce Commission aforesaid during the pendency of this action.

Second, that upon hearing, the Court set aside, annul and suspend the aforesaid order of the Interstate Commerce Commission permanently and remand the proceeding to the Commission with instructions that it shall consider the interests of the employees involved in the case as a phase of the public

convenience and necessity, and that it has full power and authority to attach such conditions to its order as it in its discretion finds necessary to the protection of the employees involved.

Third, for such other and further relief as they may be entitled to have, either at law or in equity.

FRANK L. MULHOLLAND,  
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CLARENCE M. MULHOLLAND,  
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WILLARD H. McEWEN,  
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*Attorneys for Plaintiffs.*

Edward C. Kriz,  
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*Attorney for Plaintiff.*

[Duly sworn to by J. G. Luhrsen; jurat omitted in printing.]

10

*Exhibit A to complaint*

APPENDIX A

1. No employee of the Pacific Electric Railway Company, hereinafter designated as the carrier, who is continued in service for a period of five years from the abandonment of any tracks or discontinuance of any operations by virtue of this order, shall be placed, as a result of such abandonment or discontinuance, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of such abandonment or discontinuance, so long as he is unable, in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the date of such abandonment or discontinuance; so long as he is unable to obtain a position with said carrier yielding compensation equal to or exceeding his compensation at the time of the said abandonment or discontinuance, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position from which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences, provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement,

11

reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally, provided further that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees, and provided further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

2. Any employee of the carrier who is deprived of employment with said carrier, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of such abandonment or discontinuance, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with less than one year of service) equivalent to 60 per cent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment. This allowance shall be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule:

12

Length of service:	Period of payment, months
1 year and less than 2 years.....	6
2 years and less than 3 years.....	12
3 years and less than 5 years.....	18
5 years and less than 10 years.....	36
10 years and less than 15 years.....	48
15 years and over.....	60

A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee, without good cause, to return to service after being notified by the carrier of a position for which he is eligible, and the dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

3. Any employee retained in the services of the carrier or restored to service from the group of employees entitled to receive



a dismissal allowance, who is required to change the point of his employment as a result of such abandonment or discontinuance, designated as a transferred employee, and who is required, within one year from the date of such abandonment or discontinuance, to move his place of residence, shall be reimbursed for expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and for his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carrier to be agreed upon in advance by the said carrier and the employee affected, provided, however, that changes in places of residence, subsequent to the initial change caused by the abandonment or discontinuance, which result from the exercise of seniority rights, shall not be considered as within the foregoing provision.

4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the carrier, and such fair value to be agreed upon by the carrier and each employee prior to such sale, and, if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carrier shall protect him from loss and cost in securing cancellation of his lease.

14 *Exhibit B to complaint*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 12643

PACIFIC ELECTRIC RAILWAY COMPANY ABANDONMENT

Submitted ——— Decided ——— •

Recommended that division 4 find that the present and future public convenience and necessity permit (1) abandonment by the Pacific Electric Railway Company of lines or portions of lines of railroad in Los Angeles, Orange, and Riverside Counties, Calif., except certain lines, as to which the application should be dismissed, and (2) abandonment of operation, under trackage rights, by that carrier over the line of the Union Pacific Railroad Company in Riverside and San Bernardino Counties in said State.

Frank Karr and C. W. Cornell for applicant.

E. Everett Bennett for Union Pacific Railroad Company.

Arthur C. Jenkins for Railroad-Commission of California.

W. J. Rountree, R. V. Rachford, Cornelius W. McInerny, Jr., and C. M. Mulholland for protestants.



## REPORT PROPOSED BY R. ROMERO, EXAMINER

The Pacific Electric Railway Company on November 13, 1939, applied for permission (1) to abandon lines or parts of lines of railroad, hereinafter specifically described, aggregating 96.58 miles, all in Los Angeles, Orange, and Riverside Counties, Calif., and (2) to abandon operation, under trackage rights, over a line of the Union Pacific Railroad Company, approximately 8.47 miles, all in Riverside and San Bernardino Counties, Calif. Protests were filed by the Brotherhood of Railroad Trainmen and others, and a hearing was held, at which the Railroad Commission of California was represented by counsel. Briefs have been filed.

This application is the result of a general program of rearrangement of the applicant's passenger service, involving abandonment of certain rail lines and substitution of motor-coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public. The engineering staff of the Railroad Commission of California made a comprehensive survey of all phases of the applicant's operation, resulting in certain recommendations which the applicant, in the main, incorporated in its proposed plan. Portions of the plan have been approved in part by the State commission, while other parts are awaiting disposition by that body.

The applicant questions the jurisdiction of this Commission over certain lines, hereinafter identified, used exclusively in local transportation of persons or property unrelated to interstate transportation. All of the applicant's capital stock, and a substantial portion of its bonds, are owned by the Southern Pacific Company, but the operations of each company are conducted separately. The Pacific Electric Railway is located wholly within the State of California and is operated in both interstate and intrastate commerce. Division 4 heretofore has taken jurisdiction of the operation of the applicant's railroad in proceedings before it under section 1 (18) of the Interstate Commerce Act. Unified Operation at Los Angeles Harbor, 150 I. C. C. 649, and Southern Pac. R. Co. Abandonment, 187 I. C. C. 410.

The present case does not involve cessation of all interstate operations. The result of any intrastate operation necessarily would be reflected in the applicant's income from operation of its entire railroad system and would or might impose an undue burden upon interstate commerce. Consequently the Commission's jurisdiction also extends to the operation of the lines handling the purely intrastate business. See *Texas v. Eastern Texas R. Co.*, 258 U. S. 16 204, and *Colorado v. United States*, 271 U. S. 153.

The lines or portions of lines proposed to be abandoned, referred to collectively as the lines or segments, were constructed

primarily for interurban passenger and freight service and, excepting the line operated under trackage rights, are the properties of the applicant, practically all having been acquired in 1911. Rail connections are effected with other lines of the applicant, but other than with two of the segments, there are no connections with other railroads. The lines, for the most part, are in a fair state of maintenance. Their aggregate salvage value is estimated at approximately \$504,249.

Operations of most of the segments are conducted between Los Angeles and adjoining areas handling passenger traffic almost exclusively, and serving principally a densely populated territory largely residential in character. Daily passenger service is rendered, and in most cases at frequent intervals during the day. Service for the small volume of freight available is ordinarily furnished on demand. A large number of the lines are without freight or passenger stations. In most cases the segments are closely paralleled by main highways and intersected by numerous secondary routes and city streets. In some instances the tracks are located on paved streets in which case the applicant is required to maintain the paving between the tracks and two feet on each side. In the event of abandonment the applicant proposes to substitute motor transportation for the rail service, except where otherwise hereinafter indicated.

The following is a description of the lines, together with matters having particular application:

- 17 1. Venice short line and the Echo Park Avenue line.

The portion of the Venice short line commencing at Overland Avenue, milepost 10.26, to Pacific Avenue, Venice, thence northerly to Santa Monica Boulevard, Santa Monica, milepost 17.14; approximately 6.88 miles, and the Echo Park Avenue line extending from track connection in Sunset Boulevard at Echo Park Avenue, milepost 2.29, to the end of the line at Cerro Gordo Street, milepost 3.54, approximately 1.25 miles.

At the hearing the applicant withdrew the application insofar as it concerns both lines.

2. Sawtell line.

The portion extending from Sepulvedo Boulevard, West Los Angeles, milepost 15.10, thence westerly on Santa Monica Boulevard to track connection on Ocean Avenue, Santa Monica, milepost 19.04, approximately 3.94 miles.

The Sawtell line, sometimes referred to as the Los Angeles-Santa Monica via Beverly Hills line, extends from Los Angeles to Santa Monica. The area served by the segment has a population of approximately 12,000. The number of passengers handled on the entire Sawtell line, including its Brentwood branch, hereinafter described, during the five years 1934-38 was 10,541,980, with cor-

responding revenues of \$1,312,860. The results of operation of the Sawfell segment for the 5-year period are shown as follows: System revenues from passenger traffic \$712,880, operating expenses \$175,198, cost of moving the traffic beyond the limits of the segment \$364,360, taxes \$19,442, total expenses \$559,000, and profit from operation of \$153,880, or, by years, in order, \$32,178, \$29,154, \$31,419, \$36,064, and \$25,065.

18 The segment is located on Santa Monica Boulevard, a paved street. Reconstruction of the track will be required within the next five years at an estimated cost of \$241,000. The equipment on this line was placed in service in 1908. It is unsatisfactory, obsolete, and badly undermaintained. To repair the equipment would require an expenditure of approximately \$2,000 a car, and it still would be old and unsatisfactory. The number of cars was not stated in this connection, but cost of maintenance of passenger cars was \$4,309 in 1938. To continue operation successfully, new or different rail equipment is believed essential. Because of the large expenditures required for reconstruction and the present condition of the equipment, the applicant states that it is compelled to seek abandonment of this segment, notwithstanding the favorable operating results. The applicant has another available rail route between Los Angeles and Santa Monica over its Venice short line.

### 3. Brentwood line.

Extending from track connection on Santa Monica Boulevard, West Los Angeles, milepost 15.51, to San Vicente Boulevard and Ocean Avenue, thence southerly on Ocean Avenue to Santa Monica Boulevard, Santa Monica, milepost 21.41, approximately 5.90 miles.

This segment, which is also part of the Los Angeles-Santa Monica via Beverly Hills line, serves an area of approximately 6,000 residents along San Vicente Boulevard. The results of operation of the segment for the five years 1934-38, according to the applicant's exhibits, are as follows: System passenger revenue \$164,105, operating expenses \$187,451, cost of moving

19 the traffic beyond the segment \$84,254, taxes \$43,984, total expenses \$315,689, and loss from operation \$151,584, or, by years, in order, \$19,912, \$26,712, \$31,845, \$34,122, and \$38,993. Operations of the bus service proposed to be substituted will be conducted by the Los Angeles Motor Coach Company, of which the applicant owns 30 percent of the stock.

### 4. Western and Franklin Avenue line.

Extending from track connection in Santa Monica Boulevard at Western Avenue, milepost 5.85, to track connection at Vine Street, Hollywood, milepost 8.10, approximately 2.25 miles.

This segment provides a shuttle service for an area in the Hollywood district having a population of approximately 7,500, and handles intrastate traffic only. Passengers transported in the five years 1934-38 aggregated 5,885,220. The results of operation for the 5-year period are indicated as follows: Passenger revenues \$245,815, operating expenses \$125,043, taxes \$10,552, total expenses \$135,595, and profit from operation \$110,220, or, by years, in order, \$17,959, \$19,702, \$27,153, \$27,601, and \$17,805. Operations are conducted partly on Franklin Avenue, a very narrow street. The rail service, according to the applicant's witness, is objectionable to the residents along the street and to the city of Los Angeles. Decision to seek elimination of this segment, notwithstanding its profitable operation, was prompted largely by the wishes of the city officials to have a motor-coach service substituted for the rail service.

#### 5. Venice freight line.

Extending from track connection at Pacific Avenue near Windward Avenue, Venice, to connection with the Venice short line, also portion connecting with the applicant's Inglewood line near Washington Boulevard, a total of approximately 0.88 mile.

20. No traffic has been handled on this segment during the past five years. The track has been used largely for storage purposes. For the five years 1934-38 expenditures for maintenance of way and structures amounted to \$5,109 and taxes to \$8,751, or a total loss of \$13,860. No substitution in service is contemplated in connection with this line.

#### 6. Redondo Beach via Playa del Rey.

Extending from rail crossing at or near Alla, milepost 13.25, through Playa del Rey, to Diamond Street and Pacific Avenue, Redondo Beach, milepost 23.73, approximately 10.48 miles.

This segment forms a part of the Los Angeles-Redondo Beach via Playa del Rey line extending from Los Angeles to Redondo Beach. It serves an area primarily residential, having approximately 25,000 inhabitants. The freight stations on the segment are Playa del Rey, Hyperion, El Segundo Wharf, Manhattan Beach, Hermosa, Beach, and Redondo Beach. The stations have no other railroad service, except the last three, which are also served by the Atchison, Topeka & Santa Fe Railway. Other than Redondo Beach, the stations are nonagency.

The passenger traffic handled on the entire Los Angeles-Redondo Beach via Playa del Rey line for the five years 1934-38 amounted to 2,831,262 passengers, with corresponding revenues of \$578,915. Carload traffic transported on the segment during the period mentioned aggregated 95 cars, while the tonnage of less-than-carload freight was negligible. The results of operation of the segment



for the 5-year period are shown as follows: System operating revenues \$455,758, operating expenses \$292,825, cost of moving the traffic beyond the segment \$144,687, taxes \$101,474, total expenses \$538,986, and loss from operation \$83,228, or, by years, in order, \$6,849, \$22,161, \$19,815, \$19,585, and \$14,818.

7. Redondo Beach via Gardena line.

Extending from Arlington Avenue, Moneta, milepost 15.15, to end of line at point south of Avenue I, Redondo Beach, milepost 22.16, approximately 7.01 miles.

This segment is part of the Los Angeles-Redondo Beach via Gardena line which extends from Los Angeles to Redondo Beach. The area served is principally residential and has a population of approximately 14,000, of which 12,000 reside at Redondo Beach, already included in the population indicated for the Redondo Beach via Playa del Rey line. The freight stations on the segment are Bridgedale, La Fresa, Perry, El Nido, and Clifton, all of which are nonagency stations and are without other railroad service. A passenger station is located in Redondo Beach.

The passenger traffic handled on the entire Los Angeles-Redondo Beach via Gardena line for the five years 1934-38 amounted to 1,737,698 passengers; with corresponding revenues of \$294,408. carload freight moving over the segment for the same period aggregated 186 cars. The results of operation of the segment for the 5-year period are indicated as follows: System revenues \$165,869, operating expenses \$142,461, cost of moving the traffic beyond the segment \$89,211, taxes \$56,090, total expenses \$287,762, and loss from operation \$121,893, or, by years, in order, \$17,799, \$22,802, \$23,068, \$31,165, and \$27,059.

In the event of abandonment no substituted service is contemplated, other than for the handling of less-than-carload freight or express by motor truck to and from most points along the segment. Motor common-carriers operate in this area.

8. Long Beach local lines.

(a) Pine Avenue line. Extending from track connection in Ocean Boulevard and Pine Avenue to track connection in American Avenue north of Fourteenth Street, approximately 1.37 miles.

(b) Pacific Avenue Loop line. Extending from track connection in Ocean Boulevard and Pacific Avenue to track connections at First Street and Pine Avenue, 0.15 mile.

(c) Seventh Street line. Extending from track connection in Pine Avenue and Seventh Street to track connection in Redondo Avenue, approximately 2.32 miles.

(d) Seal Beach line. Extending from track connection in Pine Avenue and Third Street, Long Beach, to a connection with Newport Beach line, Seal Beach, approximately 5.85 miles.



\* (e) Redondo Avenue line. Extending from a point north of the north line of Eleventh Street to a connection with the Seal Beach line between First and Second Streets, also track on Broadway from Redondo Avenue to a connection with the Seal Beach line in Paloma Avenue, approximately 1.49 miles.

(f) Alamitos Extension and East Second Street line. Extending from track connection with the Seal Beach line at Thirty-ninth Place to connection with the Newport Beach line at Second Street and Appian Way, approximately 1.83 miles.

The Long Beach lines serve an area of approximately 34,400 inhabitants, rendering passenger service only. Other than the Seal Beach line, the segments are devoted exclusively to the transportation of intrastate traffic. Passengers handled on the segments during the five years 1934-38 totaled 13,208,341. The results of operation for the same period are shown as follows: System operating revenues \$636,694, railway operating expenses \$560,494, taxes \$73,774, total expenses \$634,268, and profit from operation \$2,426, or, by years, in order, \$6,425, \$2,395, \$10,901, \$56, and \$17,351 (loss).

The Seventh Street line and the Seal Beach line will require expenditures within the next five years estimated at \$158,000 and \$134,700, respectively, for reconstruction and paving. There is no proposal to substitute for the rail service other forms of transportation. Long Beach at present is provided with local motor coach service by the Lang Motor Bus Company, which for the most part supplies the local bus transportation. Other rail lines of the applicant between Los Angeles and Long Beach will continue in operation. Independent bus operators have made application to operate a motor coach service in substitution for the service now provided by the rail lines proposed to be abandoned.

#### 9. Newport Beach line.

Extending from Twenty-first Street, Newport Beach, milepost 37.88, to end of line at A Street. Balboa; milepost 39.64, approximately 1.76 miles.

This segment, which is part of the Los Angeles-Newport Beach line extending from Los Angeles to Balboa, serves a territory with a population of approximately 5,000 inhabitants. The passenger traffic on the entire Los Angeles-Newport Beach-Balboa line for the five years 1934-38 amounted to 975,278 passengers, with corresponding revenues of \$331,002. One carload shipment was made on the segment during the period, and the less-than-carload traffic was negligible. The results of operation for the same period

are shown as follows: System operating revenues \$73,420, operating expenses \$16,268, cost of moving the traffic beyond the segment \$46,969, taxes \$23,208, total expenses \$86,445, and loss

from operation \$13,025, or, by years, in order, \$1,201 (profit), \$2,607, \$3,420, \$3,510, and \$4,689 (losses).

10. La Habra line.

Extending from a point near Mountain View Avenue, Yorba Linda, milepost 30.66, to end of line at Stern, milepost 32.01, approximately 1.35 miles.

This segment serves an area of approximately 2,000 inhabitants. No traffic has been handled on the line for the past five years. For the five years 1934-38 expenditures for maintenance of way and structures amounted to \$3,151 and taxes \$1,437, or a total loss of \$4,588. No substitution for the rail service is proposed. The area would be served from Yorba Linda.

11. Rialto-Riverside line.

(a) Extending from a point in Riverside Avenue, Rialto, milepost 53.43, to Houghton Avenue, Riverside, milepost 61.60, approximately 8.47 miles.

(b) Extending from Houghton Avenue, Riverside, milepost 61.60, to First Street, milepost 61.77, approximately 0.17 mile.

These segments form part of the Los Angeles-Pomona-Riverside-San Bernardino line extending from Los Angeles to San Bernardino and Riverside. The Rialto-Riverside line described in bracket (a) is owned by the Union Pacific Railroad Company but has been operated for passenger service by the applicant, under trackage rights, since 1915. Abandonment of operation only of this segment is sought.

25 The population of the territory served by both segments is approximately 37,500. There is a nonagency freight station located at Poole on the line operated under trackage rights, not far from Rialto, which is an interchange point with the Union Pacific Railroad. A passenger station is located on the line at Riverside. The population of Riverside is approximately 35,000, and it is also served by the Union Pacific Railroad, the Atchison, Topeka & Santa Fe Railroad, and the Southern Pacific Railway. The applicant does not serve intermediate points on the Rialto-Riverside line, as operation is restricted to through service.

The passenger traffic handled during the five years 1934-38 on the entire Los Angeles-Pomona-Riverside-San Bernardino line amounted to 5,521,951 passengers, with corresponding revenues of \$1,763,456. Freight service on the segment is conducted between Rialto and Poole only. Carload traffic handled during the 5-year period amounted to 3,051 cars.

The results of operation of the segments for the 5-year period are indicated as follows: System operating revenues \$222,073, operating expenses \$201,413, cost of moving the traffic beyond the segments \$127,346, taxes \$7,029, total expenses \$335,788, and loss from operation of \$113,715, or, by years, in order, \$25,744, \$20,169,

\$20,508, \$24,941, and \$22,353. For the past four years the freight revenues slightly exceeded the passenger revenues. No form of transportation would be substituted for the passenger service, resulting in no direct rail service between Riverside and Rialto, but rail connections would still be available by way of San Bernardino. The freight service will be conducted by the Union Pacific Railroad.

26 12. Pasadena local lines.

(a) Altadena line, extending from Walnut Street and Fair Oaks Avenue, Pasadena, to track connection on Lake Avenue and Mariposa Street, Altadena, approximately 4 miles.

(b) Lincoln Avenue line, extending from Fair Oaks and Lincoln Avenues to end of line at Montana Street, approximately 2.30 miles.

(c) East Colorado Street line, extending from track turnout to tracks in Lake Avenue at Colorado Street and Lake Avenue to the end of line at Daisy Avenue, Lamanda Park, approximately 2.27 miles.

(d) Lake Avenue line, extending from track turnout to tracks on Colorado Street at Colorado Street and Lake Avenue to track connection at Mariposa Street and Lake Avenue, Altadena, approximately 2.94 miles.

The Pasadena local lines serve, in passenger service only, an area having approximately 22,700 inhabitants. Transportation is limited to intrastate traffic. Passengers handled on the lines during the five years 1934-38 totaled 19,126,239. The results of operation for the same period are indicated as follows: System railway operating revenues \$971,029, railway operating expenses \$655,227, taxes \$49,509, total expenses \$704,736, and profit from operation of \$266,293, or, by years, in order, \$58,298, \$44,176, \$60,677, \$57,304, and \$45,838. The Altadena line, the Lincoln Avenue line, and the Lake Avenue line will require, within the next five years, expenditures of approximately \$73,700, \$73,500, and \$185,700, respectively, for reconstruction and paving.

13. Burbank line.

Extending from Cypress Avenue, Burbank, milepost 12.91, to end of line at Eton Drive, milepost 13.93, approximately 1.02 miles.

27 This segment, which serves an area with a population of approximately 250, is part of the Los Angeles-Glendale-Burbank lines operating between Los Angeles and Burbank.

The passenger traffic handled on the entire Los Angeles-Glendale-Burbank line during the five years 1934-38 aggregated 17,348,508 passengers, with corresponding revenues of \$1,847,083. Freight handled on the segment for the period mentioned amounted to 105 carloads. The results of operation are indicated

as follows: System railway operating revenues \$8,261, railway operating expenses \$11,675, cost of moving the traffic beyond the segment \$823, taxes \$1,700, total expenses \$14,198, and loss from operation of \$5,937, or, by years, in order, \$2,193, \$1,807, \$491, \$911, and \$535. In the event of abandonment no substitution in service is contemplated. The area would be served from Burbank.

#### 14. Edendale line.

Extending from a point in East Sixth Street near San Pedro Street, milepost 0.32, to the end of the line south of Fourth Street and easterly of Central Avenue, Los Angeles, milepost 0.92, approximately 0.60 mile.

The segment serves an area having a population of approximately 1,250 inhabitants and is part of the Edendale line which operates in Los Angeles, a distance of approximately 6 miles. The city of Los Angeles has refused to renew the franchise for operation over certain portions of the Edendale line. Continued operation of the segment would necessitate a change in route.

The passenger traffic handled on the entire Edendale line during the five years 1934-38 amounted to 13,266,032 passengers, with corresponding revenues of \$612,171. The results of operation of the segment for the period indicated are as follows:

28 System operating revenues \$37,221, railway operating expenses \$59,854, cost of moving the traffic beyond the segment \$27,917, taxes \$2,475, total expenses \$90,246, and loss from operation of \$53,025, or, by years, in order, \$9,924, \$10,653, \$10,591, \$9,799, and \$12,058. An expenditure of \$13,240 would be required within a short time for reconstruction and resurfacing of the track. It is not contemplated to substitute transportation service for that proposed to be discontinued because it is not deemed warranted.

#### 15. San Fernando line, also Owensmouth line.

Extending from a point on the San Fernando line south of Wyandotte Street, milepost 20.62, to a point on the north side of Chatsworth Street, milepost 25.75, approximately 5.13 miles; also from a point in the Hollywood-Van Nuys line south of Wyandotte Street, milepost 20.33, to the end of the line west of Topanga Canyon Avenue, milepost 29.54, approximately 9.21 miles.

These segments serve an area containing approximately 17,000 inhabitants and are part of the Los Angeles-Van Nuys-San Fernando-Canoga Park line operating between Los Angeles, Canoga Park, and San Fernando. Freight stations on the San Fernando segment are Wyandotte, Mission Acres, and Plummer, all nonagency stations. The freight stations on the Owensmouth line are Picover, Hanna, Reseda, and Canoga Park, all of which are nonagency stations. The last named is served also by the Southern Pacific Company.



Passenger traffic handled on the entire line for the four years 1934-37 and the first five months of 1938 amounted to 2,927,068 passengers, with corresponding revenues of \$598,567. On June 1, 1938, motor coach service was substituted for the rail passenger service. Freight moving during the five years 1934-38\* amounted to 650 cars between points on the segments and points beyond, and 1,372 cars of overhead or bridge traffic.\* The results of operation of the segments are indicated as follows: System railway operating revenues \$140,781, railway operating expenses \$202,747, cost of moving the traffic beyond the segment \$61,922, taxes \$23,537, total expenses \$288,206, and loss from operation of \$147,425, or, by years, in order, \$20,503, \$30,588, \$30,495, \$34,588, and \$31,251. The applicant would substitute motor truck transportation for the freight service proposed to be abandoned.

#### 16. Mount Lowe line.

Extending from Lake Avenue and Mariposa Street, Altadena, milepost 15.44, to the end of the line at Mount Lowe Tavern, milepost 21.20, approximately 5.76 miles.

This segment serves an area containing approximately 500 inhabitants. The traffic handled thereon for the four years 1934-37 amounted to 249,054 passengers, with corresponding revenues of \$108,260. The results of operation for 1934, 1935, and the first nine months of 1936 are indicated as follows: System railway operating revenues \$103,333, operating expenses \$50,237, cost of moving the traffic beyond the segment \$34,347, taxes \$8,044, total expenses \$92,628, and profit from operation of \$10,705, or, by years, in order, \$2,562, \$2,312, and \$5,831. The passenger service was discontinued in February 1938, and no rail service has been rendered since. This line was operated to serve principally Mount Lowe Tavern, which burned in 1936 and has not been rebuilt. No service would be substituted for that proposed to be abandoned, as the traffic available does not warrant it. The nearest rail service to the area would be at Pasadena, about 2.25 miles.

This completes the individual description of the lines.

The passenger revenues were derived almost entirely from traffic local to the applicant's line. No information is available as to interline passenger traffic. In determining the operating results each segment was credited with the entire system revenues from all traffic handled thereon. The operating expenses were apportioned, for the most part, on a mileage basis. Some charges for maintenance of way and structures were prorated on the basis of actual expenses incurred. Where it is proposed to abandon an entire line, no charge is made to cover the cost of moving the traffic

\*Since August 1938, the overhead traffic has been transported over another track.



beyond the segment, as practically all traffic handled was local to the line. -Where a portion of a line is involved, an estimate was made of the total cost of operating the section of the line beyond the segment based on costs derived on a car-mile basis, and of that estimated sum a portion was charged to the segment for handling the traffic beyond in the same ratio as the segment revenue from traffic other than local bears to the revenue of the entire line. For instance, in the case of the Santa Monica-Beverly Hills line, the 1938 revenue from segment traffic moving beyond was \$140,521, or 52.13 percent of \$269,558, the total line revenue. The total estimated cost of operating the section of line beyond the point proposed to be abandoned is \$150,960, so that the proportional amount charged for handling the traffic beyond the segment is 52.13 percent of that amount, or \$78,695. The principal tax charged was an ad valorem tax based on the assessed values of the properties.

The applicant's income accounts for the past 15 years indicate that operations of the entire railroad have resulted  
 31 in substantial net losses. During the period 1927-33 railway operating revenues declined from approximately \$19,000,000 to about \$9,000,000. The revenues for the last four years have fluctuated between \$10,000,000 and \$11,000,000. Expenditures for maintenance of way and structures for each of the last nine years have been approximately but half, or less, of the amount appropriated for that purpose in 1927, resulting in the accrual of large amounts of deferred maintenance. It was stated that on that account there is urgent need of material increases in expenditures for maintenance if the applicant's lines are to be kept in operation and render satisfactory service to the public. For the past eight years the applicant has incurred deficits in net railway operating income ranging from \$17,743 in 1936 to \$826,505 in 1938, and a deficit of \$608,989 in 1939.

The Southern Pacific Company from time to time has made advances to the applicant for capital additions and betterments, for operating expenses when not earned, and for the payment of interest on the outstanding bonds held by the public. According to estimates made by the State commission in proceedings before it, the gross revenues received by the Southern Pacific on freight interchanged with the Pacific Electric Company in 1937, amounted to \$4,591,417, resulting in a profit of \$1,836,567, if the out-of-pocket cost of handling the business is based on 60 percent of the gross revenues, and \$1,377,425, if the cost is based on 70 percent. It was estimated that in the absence of the present corporate relationship between the Southern Pacific and the applicant, the  
 32 former's gross revenue from the latter's traffic would be more than \$1,000,000 less than under existing affiliations. It was also estimated that the Atchison, Topeka & Santa Fe

Railway Company's share of the freight moving to or from the lines of the Pacific Electric was \$662,019, while that of the Union Pacific amounted to approximately \$1,000,000.

Future expenses, if the segments are continued in operation as at present, for ordinary maintenance of way and structures are expected to increase in the next seven years from \$79,906 in 1940 to \$190,894 in 1944 and each year thereafter, exclusive of an expenditure of \$866,600 within the next five years for reconstruction of tracks and paving of city streets. The proposed abandonments would eliminate expenses in maintenance of way, including expenses for reconstruction and paving, averaging about \$303,400 a year for a 7-year period. The cost of maintaining way and structures of the entire railroad if present operations continue without change would average approximately \$1,897,284 a year, based on the same number of years.

In advocating the proposed program of rearrangement the applicant states that it was not motivated by the excessive cost of rehabilitating the rail equipment, as its cost is practically the same as that for motor coaches, but rather by the expenditures which would be required for maintenance and rehabilitation of the line itself and the public preference for motor transportation. Based upon studies of the applicant begun in 1935 and completed in August 1939, it was concluded that the proposed abandonments, substitutions, and changes would result in an increased net operating benefit of \$1,109,022 a year. The studies embrace changes not yet presented either to this Commission or to the State commission. It is stated that in arriving at the increased net operating benefit, consideration was given to deferred maintenance, 33 depreciation of equipment, increased revenue as the result of the elimination of the unprofitable segments, improvement in service, and operating savings in power, equipment, maintenance, and taxes.

Comparisons of the present rail operations with the proposed operations in connection with the main segments have been submitted. Where the segment is part of a line the cost of operation embraces the entire line, as well as its corresponding motor service. Where dual operation is performed the expenses of the portion jointly used are prorated. The estimate shows revenues, out-of-pocket expenses, and net out-of-pocket profit or loss under (a) present rail operation, (b) continued rail operations with present equipment and type of service based on a 5-year average, and (c) the proposed motor operation. The rail out-of-pocket cost consists principally of expenses for maintenance of way and structures, maintenance of equipment, power, wages of trainmen, cleaning and lubricating cars, and taxes. The aggregate net out-of-pocket profit or loss shown is a total profit of \$63,698 under present

22. UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N

rail operations, a deficit of \$131,176 under continued rail operation, and a profit of \$441,927 under the proposed motor coach service, or a gain under proposed over present operations of \$378,229. The estimate, according to the witness, is based upon the theory that rail operating revenues will decrease in the next five years and expenses of maintenance of way and structures will increase. The motor coach operations are estimates based on the applicant's experience in that field.

The Railway Labor Executives' Association and the Brotherhood of Railroad Trainmen are the only protestants showing active opposition to the granting of the application. No witnesses

34 appeared in behalf of the protestants. Counsel for the labor organizations submitted a copy of an agreement between the applicant and the Brotherhood of Railroad Trainmen relative to rates of pay, working conditions, and other incidental matters, and also a copy of what is known as the job protective agreement entitled "Agreement of May, 1936, Washington, D. C.," entered into between a large number of railroad companies, exclusive of the applicant, and railway labor executives.

The labor organizations, at times hereinafter referred to as the protestants, contend that the operation of motor busses under the proposed plan will aggravate an already acute traffic congestion on the highways, particularly in and about the city of Los Angeles, the rail operations being conducted to a large extent over privately-owned rights-of-way.

It is conceded by the protestants that the proposed abandonment would strengthen the operating and financial position of the applicant and its parent company, the Southern Pacific, but it is contended that the plan would be effected largely at the expense of employees. The protestants estimate the profit to the Southern Pacific from freight traffic interchanged with the Pacific Electric at \$160,353 a year. The estimate is arrived at by using the 1937 profit of \$1,836,567 and deducting therefrom \$1,676,214, which represents the interest paid by the Southern Pacific on the bonded debt. The latter figure was determined by subtracting from the applicant's 1939 deficit in net income of \$2,918,734 a sum equal to 52 percent of \$2,389,462 charged to interest on funded debt in 1939. This calculation, however, does not appear to have taken into consideration the fact that the applicant is indebted in open account to the Southern Pacific to the extent of approximately \$50,000,000.

35 In 1936 the applicant's force of employees was reduced from about 7,500 to 3,500 men. The number employed at present is approximately 4,000. The rehabilitation program is expected to result in an increase in employment, but if it should cause displacement of train-service employees the applicant is un-

willing to pay compensation for loss of employment. However, an effort would be made to replace any such employee in other departments, wherever possible, until such time as employment would become available in the transportation department. Of approximately 32 men recently displaced because of reduction in service in Long Beach and discontinuance of service on the Gardena-Redondo line, and the Torrance branch, 15 men are at present out of employment, but the applicant expects to reinstate them during the current year. The Sawtell segment is operated by approximately 50 motormen and conductors, one-half of whom would be removed from their present positions under the rearrangement program. There will be removals from other segments as well, in numbers unknown at present. Nevertheless the applicant anticipates absorption of all displaced employees in the ordinary turnover resulting from death, retirement, disability, and resignation. Some will qualify as motorbus operators. All these anticipations are based largely on past experiences.

The applicant submitted exhibits showing age of trainmen and motor coach operators, seniority of train service employees, rate of pay to train and motor coach service employees, skilled shop labor, and construction and maintenance-of-way forces. Of the trainman and motor coach operators 454 are under 40 years of age, 581 are 40 years and over, 406 are 50 years and over, and 102 are 60 years and over. According to calculations made by the protestants on the information furnished by the applicant, of the train-service employees 19 have seniority of less than one year, 317 have one year and less than 10 years, 307 have 10 years and less than 15 years, and 843 have 15 years and over. The hourly rate of pay to train and motor coach service employees since October 1, 1937, has ranged from 63.5 cents to 99.7 cents.

According to calculations made by the protestants, based on information furnished by the applicant's exhibit showing comparisons of present rail operations with the proposed operations in connection with the main segments, wages to rail motormen and conductors would be reduced to the extent of \$290,968 annually, while wages of motor coach drivers will increase by \$79,599 a year, resulting in a net annual loss of wages of train and bus operators of \$211,369. It is estimated that additional wage losses would result in the maintenance of way and maintenance of equipment departments, amounting to \$125,565, which would be offset by wage increases in truck operations of about \$34,938, or a net loss of \$90,627. Wages in these departments were ascertained on the basis of certain percentages which, according to the applicant's estimates, represent the labor cost ranging from 60 to 70 percent of the total expenses in that field. According to the foregoing calculation, the aggregate



saving of \$378,229 under the proposed plan includes a total of \$301,996 as the cost of labor.

In the event of abandonment the protestants seek the imposition of conditions for the protection of the interest of employees substantially in effect as those imposed in Chicago, R. I. & G. Ry. Co.

Trustees Lease, 230 I. C. C. 181. On brief, counsel for the labor organizations sets forth considerable argument, citing several extracts from the recent decision of the United States Supreme Court in United States v. Lowden, 308 U. S. 225, and from other cases, in support of the contention that this Commission has authority to impose conditions for the protection of employees in abandonment proceedings, as is the case in proceedings under section 5 (4) of the Interstate Commerce Act. Counsel concludes that the results of abandonment of a portion of a railroad system, as in the instant proceeding, are comparable to those secured from a consolidation or coordination of railroads; that in the one case contemplated economies are expected to result from a rearrangement of available facilities in such a manner as to better meet public need, while the other case is predicated upon expected economies to be derived from the elimination of certain duplicated operations or facilities; that in both situations the application is based on the ground that the railroad and the public will benefit by the elimination of wasteful operations; and that in either case the elimination of operations results in loss of employment, so that any public benefit accruing to the carrier is acquired at the expense of a corresponding loss to the employees.

In Chicago, Springfield & St. Louis Ry. Co. Receiver Abandonment, 236 I. C. C. 765, decided February 21, 1940, involving the abandonment of an entire railroad, division 4 stated that the Commission is without authority to attach conditions for the protection of employees in abandonment proceedings, citing Chicago G. W. R. Co. Trackage, 207 I. C. C. 315. See also in this connection Quincy, O. & K. C. R. Co. Abandonment and Control, 233 I. C. C. 471.

Under the proposed plan of rearrangement the public will continue to receive common-carrier transportation in cases where motor coach service will be substituted for that proposed to be discontinued. Where no substitution in service is contemplated there is no apparent further public need for it. Substantial savings undoubtedly would be effected by the abandonments but probably not to the extent anticipated by the applicant. Under the circumstances, to continue operation of the lines hereinafter recommended to be abandoned would impose an undue burden upon the applicant and upon interstate commerce.

It is recommended that division 4 find that the present and future public convenience and necessity permit (1) abandonment by the

Pacific Electric Railway Company of its lines or portions of lines of railroad in Los Angeles, Orange, and Riverside Counties, Calif., described herein, excepting the Venice short line, and the Echo Park Avenue line, as to which the application should be dismissed, and (2) abandonment of operation, under trackage rights, by the Pacific Electric Railway Company over the line of the Union Pacific Railroad Company in Riverside and San Bernardino Counties, in said State, also described herein. An appropriate certificate and order should be issued.

*Exhibit C to complaint*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 12643

PACIFIC ELECTRIC RAILWAY COMPANY ABANDONMENT

Submitted July 20, 1940. Decided August 28, 1940

1. Certificate issued permitting (a) abandonment by the Pacific Electric Railway Company of certain lines or portions of lines of railroad in Los Angeles, Orange, and Riverside Counties, Calif., and (b) abandonment of operation, under trackage rights, by that carrier over the line of the Union Pacific Railroad Company in Riverside and San Bernardino Counties in that State.

2. Application dismissed as to certain lines in Los Angeles County, Calif.

Frank Karr and C. W. Cornell for applicant.  
E. Everett Bennett for Union Pacific Railroad Company.  
Arthur C. Jenkins for Railroad Commission of California.  
W. J. Rountree, R. V. Rachford, Cornelius W. McInerny, Jr.,  
Frank L. Mulholland, C. M. Mulholland, and Willard H. McEwen  
for protestants.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Johnson

By Division 4:

Exceptions to the report proposed by the examiner were filed. The Pacific Electric Railway Company on November 13, 1939, applied for permission (1) to abandon lines or parts of lines of railroads, hereinafter specifically described, aggregating about 88.11 miles, in Los Angeles, Orange, and Riverside Counties, Calif., and (2) to abandon operation, under trackage rights, over a line of the Union Pacific Railroad Company, approximately 8.47 miles, in Riverside and San Bernardino Counties, Calif. Protests were

filed by the Brotherhood of Railroad Trainmen and others, and a hearing was held, at which the Railroad Commission of California was represented by counsel.

This application is the result of a general program of rearrangement of the applicant's passenger service, involving abandonment of certain rail lines and substitution of motor coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public. The engineering staff of the Railroad Commission of California made

a comprehensive survey of all phases of the applicant's operation, resulting in certain recommendations which, in the main, the applicant incorporated in its proposed plan. Portions of the plan have been approved in part by the State commission, while other parts are awaiting disposition by that body.

The applicant questions our jurisdiction over certain lines, hereinafter identified, used exclusively in local transportation of persons or property unrelated to interstate transportation, but physically connected with other lines of the applicant, forming a part of its railroad, and yielding gross operating revenues of more than \$1,000,000 for a 5-year period. All the applicant's capital stock, and a substantial portion of its bonds, are owned by the Southern Pacific Company, but the operations of each company are conducted separately. The Pacific Electric Railway is located wholly within the State of California and is operated in both interstate and intrastate commerce. We have heretofore taken jurisdiction of the operation of the applicant's railroad in proceedings before us under section 1 (18) of the Interstate Commerce Act. *Unified Operation at Los Angeles Harbor*, 150 I. C. C. 649, and *Southern Pac. R. Co. Abandonment*, 187 I. C. C. 410.

The present case does not involve cessation of all interstate operations. The result of any operation in intrastate commerce necessarily would be reflected in the applicant's income from operation of its entire railroad system and would or might impose an undue burden upon interstate commerce. Consequently our jurisdiction also extends to the operation of the lines handling the purely intrastate business. See *Texas v. Eastern Texas R. Co.*, 258 U. S. 204, and *Colorado v. United States*, 271 U. S. 153.

The lines or portions of lines proposed to be abandoned, referred to collectively as the lines or segments, were constructed primarily for interurban passenger and freight service and, excepting the line operated under trackage rights, are the properties of the applicant, practically all having been acquired in 1911. Rail connections are effected with other lines of the applicant, but

other than with two of the segments, there are no connections with other railroads. The lines, for the most part, are in a fair state of maintenance. Their total salvage value is estimated at approximately \$504,249.

Operations of most of the segments are conducted between Los Angeles and adjoining areas handling passenger traffic almost exclusively, and serving principally a densely populated territory largely residential in character. Daily passenger service is rendered, and in most cases at frequent intervals during the day. Service for the small volume of freight available is ordinarily furnished on demand. Many of the lines are without freight or passenger stations. In most cases the segments are closely paralleled by main highways and intersected by numerous secondary routes and city streets. In some instances the tracks are located on paved streets, in which case the applicant is required to maintain the paving between the tracks and two feet on each side. In the event of abandonment the applicant proposes to substitute motor transportation for the rail service, except where otherwise hereinafter indicated.

The lines involved are as follows:

1. Venice short line and the Echo Park Avenue line.

The portion of the Venice short line commencing at Overland Avenue, milepost 10.26, to Pacific Avenue, Venice, thence northerly to Santa Monica Boulevard, Santa Monica, milepost 17.14, approximately 6.88 miles, and the Echo Park Avenue line extending from track connection in Sunset Boulevard at Echo Park Avenue, milepost 2.29, to the end of the line at Cerro Gordo Street, milepost 3.54, approximately 1.25 miles.

At the hearing the applicant withdrew the application insofar as it concerns both lines.

2. Sawtelle line.

The portion extending from Sepulveda Boulevard, West Los Angeles, milepost 15.10, thence westerly on Santa Monica Boulevard to track connection on Ocean Avenue, Santa Monica, milepost 19.04, approximately 3.94 miles.

The Sawtelle line, sometimes referred to as the Los Angeles-Santa Monica via Beverly Hills line, extends from Los Angeles to Santa Monica. The area served by the segment has a population of approximately 12,000. The number of passengers handled on the entire Sawtelle line, including its Brentwood branch, hereinafter described, during the five years 1934-38 was 10,541,980, with corresponding revenues of \$1,312,860. The results of operation of the Sawtelle segment for the 5-year period are shown as follows: System revenues from passenger traffic \$712,880, operating expenses \$175,198, cost of moving the traffic beyond the limits of the segment



\$364,360, taxes \$19,442, total expenses \$559,000, and profit from operation \$153,880, or, by years, in order, \$32,178, \$29,154, \$31,419, \$36,064, and \$25,065.

The segment is located on Santa Monica Boulevard, a paved street. Reconstruction of the track will be required within the next five years at an estimated cost of \$241,000. The equipment on this line was placed in service in 1908. It is unsatisfactory, obsolete, and badly undermaintained. To repair the equipment would require an expenditure of approximately \$2,000 a car, and it still would be old and unsatisfactory. The number of cars was not stated in this connection, but cost of maintenance of passenger cars was \$4,309 in 1938. To continue operation successfully, new or different rail equipment is believed essential. Because of the large expenditures required for reconstruction and the present condition of the equipment, the applicant states that it is compelled to seek abandonment of this segment, notwithstanding the favorable operating results. The applicant has another available rail route between Los Angeles and Santa Monica over its Venice short line.

#### 42 3. Brentwood line.

Extending from track connection on Santa Monica Boulevard, West Los Angeles, milepost 15.51, to San Vicente Boulevard and Ocean Avenue, thence southerly on Ocean Avenue to Santa Monica Boulevard, Santa Monica, milepost 21.41, approximately 5.90 miles.

This segment, which is also part of the Los Angeles-Santa Monica via Beverly Hills line, serves an area of approximately 6,000 residents along San Vicente Boulevard. The results of operation of the segment for the five years 1934-38 according to the applicant's exhibits are as follows: System passenger revenue \$164,105, operating expenses \$187,451, cost of moving the traffic beyond the segment \$84,254, taxes \$43,984, total expenses \$315,689, and loss from operation \$151,584, or, by years, in order, \$19,912, \$26,712, \$31,845, \$34,122, and \$38,993. Operations of the bus service proposed to be substituted will be conducted by the Los Angeles Motor Coach Company, of which the applicant owns 30 percent of the stock.

#### 4. Western and Franklin Avenue line.

Extending from track connection in Santa Monica Boulevard at Western Avenue, milepost 5.85, to track connection at Vine Street, Hollywood, milepost 8.10, approximately 2.25 miles.

This segment provides a shuttle service for an area in the Hollywood district having a population of approximately 7,500, and handles intrastate traffic only. Passengers carried in the five years 1934-38 aggregated 5,885,220. The results of operation for the

5-year period are indicated as follows: Passenger revenues \$245,815, operating expenses \$125,043, taxes \$10,552, total expenses \$135,595, and profit from operation \$110,220, or, by years, in order, \$17,959, \$19,702, \$27,153, \$27,601, and \$17,805. Operations are conducted partly on Franklin Avenue, a very narrow street. The rail service according to the applicant's witness is objectionable to the residents along the street and to the city of Los Angeles. Decision to seek elimination of this segment, notwithstanding its profitable operation, was prompted largely by the wishes of the city officials to have a motor coach service substituted for the rail service.

#### 5. Venice freight line.

Extending from track connection at Pacific Avenue near Windward Avenue, Venice, to connection with the Venice short line, also portion connecting with the applicant's Inglewood line near Washington Boulevard, a total of approximately 0.88 mile.

No traffic has been handled on this segment during the past five years. The track has been used largely for storage purposes. For the five years 1934-38 expenditures for maintenance of way and structures amounted to \$5,109 and taxes to \$8,751, or a total loss of \$13,860. No substitution in service is contemplated in connection with this line.

#### 43 6. Redondo Beach via Playa del Rey.

Extending from rail crossing at or near Alla, milepost 13.25, through Playa del Rey, to Diamond Street and Pacific Avenue, Redondo Beach, milepost 23.73, approximately 10.48 miles.

This segment forms a part of the Los Angeles-Redondo Beach via Playa del Rey line extending from Los Angeles to Redondo Beach. It serves an area primarily residential, having approximately 25,000 inhabitants. The freight stations on the segment are Playa del Rey, Hyperion, El Segundo Wharf, Manhattan Beach, Hermosa Beach, and Redondo Beach. The stations have no other railroad service, except the three last mentioned, which are also served by the Atchison, Topeka & Santa Fe Railway. Other than Redondo Beach, the stations are nonagency.

The passenger traffic handled on the entire Los Angeles-Redondo Beach via Playa del Rey line for the five years 1934-38 amounted to 2,831,262 passengers, with corresponding revenues of \$578,915. Carload traffic transported on the segment during the period mentioned aggregated 95 cars, while the tonnage of less-than-carload freight was negligible. The results of operation of the segment for the 5-year period are shown as follows: System operating revenues \$455,758, operating expenses \$292,825, cost of moving the traffic beyond the segment \$144,687, taxes \$101,474, total expenses \$538,986, and loss from operation \$83,228, or, by years, in order, \$6,849, \$22,161, \$19,815, \$19,585, and \$14,818.

#### 7. Redondo Beach via Gardena line.

Extending from Arlington Avenue, Moneta, milepost 15.15, to end of line at point south of Avenue I, Redondo Beach, milepost 22.16, approximately 7.01 miles.

This segment is part of the Los Angeles-Redondo Beach via Gardena line which extends from Los Angeles to Redondo Beach. The area served is principally residential and has a population of approximately 14,000, of whom 12,000 reside at Redondo Beach, already included in the population indicated for the Redondo Beach via Playa del Rey line. The freight stations on the segment are Bridgedale, La Fresa, Perry, El Nido, and Clifton, all of which are nonagency stations and are without other railroad service. A passenger station is located in Redondo Beach.

The passenger traffic handled on the entire Los Angeles-Redondo Beach via Gardena line for the five years 1934-38 amounted to 1,737,698 passengers, with corresponding revenues of \$294,408. Carload freight moving over the segment for the same period aggregated 186 cars. The results of operation of the segment for the 5-year period are indicated as follow: System revenues \$165,869, operating expenses \$142,461, cost of moving the traffic beyond the segment \$89,211, taxes \$56,090, total expenses \$287,762, and loss from operation \$121,893, or, by years, in order, \$17,799, \$22,802, \$23,068, \$31,165, and \$27,059.

44 ° In the event of abandonment no substituted service is contemplated, other than for the handling of less-than-carload freight or express by motor truck to and from most points along the segment. Motor common-carriers operate in this area.

#### 8. Long Beach local lines.

(a) Pine Avenue line. Extending from track connection in Ocean Boulevard and Pine Avenue to track connection in American Avenue north of Fourteenth Street, approximately 1.37 miles.

(b) Pacific Avenue loop line. Extending from track connection in Ocean Boulevard and Pacific Avenue to track connections at First Street and Pine Avenue, 0.15 mile.

(c) Seventh Street line. Extending from track connection in Pine Avenue and Seventh Street to track connection in Redondo Avenue, approximately 2.32 miles.

(d) Seal Beach line. Extending from track connection in Pine Avenue and Third Street, Long Beach, to a connection with Newport Beach line, Seal Beach, approximately 5.85 miles.

(e) Redondo Avenue line. Extending from a point north of the north line of Eleventh Street to a connection with the Seal Beach line between First and Second Streets, also track on

Broadway from Redondo Avenue to a connection with the Seal Beach line in Paloma Avenue, approximately 1.49 miles.

(f) Alamitos Extension and East Second Street line. Extending from track connection with the Seal Beach line at Thirty-ninth Place to connection with the Newport Beach line at Second Street and Appian Way, approximately 1.83 miles.

The Long Beach local lines serve an area having approximately 34,400 inhabitants, rendering passenger service only. Other than the Seal Beach line, the segments are devoted exclusively to the transportation of intrastate traffic. Passengers handled on the segments during the five years 1934-38 totaled 13,208,341. The results of operation for the same period are shown as follows: System operating revenues \$636,694, railway operating expenses \$560,494, taxes \$73,774, total expenses \$634,268, and profit from operation \$2,426, or, by years, in order, \$6,425, \$2,395, \$10,901, \$56, and \$17,351 (loss).

The Seventh Street line and the Seal Beach line will require expenditures within the next five years estimated at \$158,000 and \$134,700, respectively, for reconstruction and paving. There is no proposal to substitute for the rail service other forms of transportation. Long Beach at present is provided with local motor coach service by the Lang Motor Bus Company, which for the most part supplies the local bus transportation. Other rail lines of the applicant between Los Angeles and Long Beach will continue in operation. Independent bus operators have made application to operate a motor coach service in substitution for the service now provided by the rail lines proposed to be abandoned.

#### 45 9. Newport Beach line.

Extending from Twenty-first Street, Newport Beach, milepost 37.88, to end of line at A Street, Balboa, milepost 39.64, approximately 1.76 miles.

This segment, which is part of the Los Angeles-Newport Beach line extending from Los Angeles to Balboa, serves a territory with a population of approximately 5,000 inhabitants. The passenger traffic on the entire Los Angeles-Newport Beach-Balboa line for the five years 1934-38 amounted to 975,278 passengers, with corresponding revenues of \$331,002. One carload shipment was made on the segment during the period, and the less-than-carload traffic was negligible. The results of operation for the same period are shown as follows: System operating revenues \$73,420, operating expenses \$16,268, cost of moving the traffic beyond the segment \$46,969, taxes \$23,208, total expenses \$86,445, and loss from operation \$13,025, or, by years, in order, \$1,201 (profit), \$2,607, \$3,420, \$3,510, and \$4,689.



## 10. La Habra line.

Extending from a point near Mountain View Avenue, Yorba Linda, milepost 30.66, to end of line at Stein, milepost 32.01, approximately 1.35 miles.

This segment serves an area of approximately 2,000 inhabitants. No traffic has been handled on the line for the past five years. For the five years 1934-38 expenditures for maintenance of way and structures amounted to \$3,151 and taxes \$1,347, or a total loss of \$4,588. No substitution for the rail service is proposed. The area would be served from Yorba Linda.

## 11. Rialto-Riverside line.

(a) Extending from a point in Riverside Avenue, Rialto, milepost 53.13, to Houghton Avenue, Riverside, milepost 61.60, approximately 8.47 miles.

(b) Extending from Houghton Avenue, Riverside, milepost 61.60, to First Street, milepost 61.77, approximately 0.17 mile.

These segments form part of the Los Angeles-Pomona-Riverside-San Bernardino line extending from Los Angeles to San Bernardino and Riverside. The Rialto-Riverside line described in bracket (a) is owned by the Union Pacific Railroad Company but has been operated for passenger service by the applicant, under trackage rights, since 1915. Abandonment of operation only of this segment is sought.

The population of the territory served by both segments is approximately 37,500. There is a nonagency freight station located at Poole on the line operated under trackage rights, not far from

Rialto, which is an interchange point with the Union Pacific Railroad. A passenger station is located on the line at

Riverside. The population of Riverside is approximately 35,000, and it is also served by the Union Pacific Railroad, the Atchison, Topeka & Santa Fe Railroad, and the Southern Pacific Railway. The applicant does not serve intermediate points on the Rialto-Riverside line, as operation is restricted to through service.

The passenger traffic handled during the five years 1934-38 on the entire Los Angeles-Pomona-Riverside-San Bernardino line amounted to 5,521,951 passengers, with corresponding revenues of \$1,763,456. Freight service on the segment is conducted between Rialto and Poole only. Carload traffic handled during the 5-year period amounted to 3,051 cars.

The results of operation of the segments for the 5-year period are indicated as follows: System operating revenues, \$222,073; operating expenses, \$201,413; cost of moving the traffic beyond the segments, \$127,346; taxes, \$7,029; total expenses, \$335,788; and loss from operation, \$113,715; or, by years, in order, \$25,744, \$20,169, \$20,508, \$24,941, and \$22,353. For the past four years the freight revenues slightly exceeded the passenger revenues. No form of

transportation would be substituted for the passenger service, resulting in no direct rail service between Riverside and Rialto, but rail connections would still be available by way of San Bernardino. The freight service will be conducted by the Union Pacific Railroad.

12. Pasadena local lines.

(a) Altadena line, extending from Walnut Street and Fair Oaks Avenue, Pasadena, to track connection on Lake Avenue and Mariposa Street, Altadena, approximately 4 miles.

(b) Lincoln Avenue line extending from Fair Oaks and Lincoln Avenues to end of line at Montana Street, approximately 2.30 miles.

(c) East Colorado Street line, extending from track turn-out to tracks in Lake Avenue at Colorado Street and Lake Avenue to the end of line at Daisy Avenue, Lamanda Park, approximately 2.27 miles.

(d) Lake Avenue line, extending from track turn-out to tracks on Colorado Street at Colorado Street and Lake Avenue to track connection at Mariposa Street and Lake Avenue, Altadena, approximately 2.94 miles.

The Pasadena local lines serve, in passenger service only, an area having approximately 22,700 inhabitants. Transportation is limited to intrastate traffic. Passengers handled on the lines during the five years 1934-38 totaled 19,126,239. The results of operation for the same period are indicated as follows: System railway operating revenues, \$971,029; railway operating expenses, \$655,227; taxes, \$49,509; total expenses, \$704,736; and profit from operation, \$266,293; or, by years, in order, \$58,298, \$44,176, \$60,677,

47 \$57,304, and \$45,838. The Altadena line, the Lincoln Avenue line, and the Lake Avenue line will require, within the next five years, expenditures of approximately \$73,700, \$73,500, and \$185,700, respectively, for reconstruction and paving.

13. Burbank line

Extending from Cypress Avenue, Burbank, milepost 12.91, to end of line at Eton Drive, milepost 13.93, approximately 1.02 miles.

This segment, which serves an area with a population of approximately 250, is part of the Los Angeles-Glendale-Burbank lines operating between Los Angeles and Burbank.

The passenger traffic handled on the entire Los Angeles-Glendale-Burbank line during the five years 1934-38 aggregated 17,348,508 passengers, with corresponding revenues of \$1,847,083. Freight handled on the segment for the period mentioned amounted to 105 carloads. The result of operation are indicated as follows: System railway operating revenues \$8,261, railway operating expenses

\$11,675, cost of moving the traffic beyond the segment \$823, taxes \$1,700, total expenses \$14,198, and loss from operation \$5,937, or, by years, in order, \$2,192, \$1,807, \$491, \$911, and \$535. In the event of abandonment no substitution in service is contemplated. The area would be served from Burbank.

#### 14. Edendale line

Extending from a point in East Sixth Street near San Pedro Street, milepost 0.32, to the end of the line south of Fourth Street and easterly of Central Avenue, Los Angeles, milepost 0.92, approximately 0.60 mile.

The segment serves an area having a population of approximately 1,250 inhabitants and is part of the Edendale line which operates in Los Angeles, a distance of approximately 6 miles. The city of Los Angeles has refused to renew the franchise for operation over certain portions of the Edendale line. Continued operation of the segment would necessitate a change in route.

The passenger traffic handled on the entire Edendale line during the five years 1934-38 amounted to 13,266,032 passengers, with corresponding revenues of \$612,171. The results of operation of the segment for the period indicated are as follows: System operating revenues \$37,221, railway operating expenses \$59,854, cost of moving the traffic beyond the segment \$27,917, taxes \$2,475, total expenses \$90,246, and loss from operation \$53,025, or, by years, in order, \$9,924, \$10,653, \$10,591, \$9,799, and \$12,058. An expenditure of \$13,240 would be required within a short time for reconstruction and resurfacing of the track. It is not contemplated to substitute transportation service for that proposed to be discontinued.

#### 15. San Fernando line, also Owensmouth line

Extending from a point on the San Fernando line south of Wyandotte Street, milepost 20.62, to a point on the north side of Chatsworth Street, milepost 25.75, approximately 5.13 miles; also from a point in the Hollywood-Van Nuys line south of Wyandotte Street, milepost 20.33, to the end of the line west of Topanga Canyon Avenue, milepost 29.54, approximately 9.21 miles.

These segments serve an area containing approximately 17,000 inhabitants and are part of the Los Angeles-Van Nuys-San Fernando-Canoga Park line operating between Los Angeles, Canoga Park, and San Fernando. Freight stations on the San Fernando segment are Wyandotte, Mission Acres, and Plummer, all non-agency stations. The freight stations on the Owensmouth line are Picover, Hanna, Reseda, and Canoga Park, all of which are non-

agency stations. The last named is served also by the Southern Pacific Company.

Passenger traffic handled on the entire line for the four years 1934-37 and the first five months of 1938 amounted to 2,927,068 passengers; with corresponding revenues of \$598,567. On June 1, 1938, motor coach service was substituted for the rail passenger service. Freight moving during the five years 1934-38\* amounted to 650 cars between points on the segments and points beyond; and 1,372 cars of overhead or bridge traffic.\* The results of operation of the segments are indicated as follows: System railway operating revenues \$140,781, railway operating expenses \$202,747, cost of moving the traffic beyond the segment \$61,922, taxes \$23,537, total expenses \$288,206, and loss from operation \$147,425, or, by years, in order \$20,503, \$30,588, \$30,495, \$34,588, and \$31,251. The applicant would substitute motor truck transportation for the freight service proposed to be abandoned.

#### 16. Mount Lowe line

Extending from Lake Avenue and Mariposa Street, Altadena, milepost 15.44, to the end of the line at Mount Lowe Tavern, milepost 21.20, approximately 5.76 miles.

This segment, devoted to intrastate transportation exclusively, serves an area containing approximately 500 inhabitants. The passenger traffic thereon for the four years 1934-37 amounted to 249,054 passengers, with corresponding revenues of \$108,260. The amount of freight handled was negligible. The results of operation for 1934, 1935, and the first nine months of 1936 are indicated as follows: System railway operating revenues, excluding freight revenues, \$103,333, operating expenses \$50,237, cost of moving the traffic beyond the segment \$34,347, taxes \$8,044, total expenses \$92,628, and profit from operation \$10,705, or, by years, in order, \$2,562, \$2,312, and \$5,831. The passenger service was discontinued in February 1938, and no rail service has been rendered since. This line was operated to serve principally Mount Lowe Tavern, which burned in 1936 and has not been rebuilt. No service would be substituted for that proposed to be abandoned, as the traffic available does not warrant it. The nearest rail service would be at Pasadena, about 2.25 miles.

The foregoing individual description covers all of the lines under consideration. Referring now to the segments generally, the evidence shows that the passenger revenues were derived almost entirely from traffic local to the applicant's line. No information is available as to interline passenger traffic. In determining the

\*Since August 1938, the overhead traffic has been transported over another track.



operating results, each segment was credited with the entire system revenues from all traffic handled thereon. The operating expenses were apportioned, for the most part, on a mileage basis. Some charges for maintenance of way and structures were prorated on the basis of actual expenses incurred. Where it is proposed to abandon an entire line, no charge is made to cover the cost of moving the traffic beyond the segment, as practically all traffic handled was local to the line. Where a portion of a line is involved, an estimate was made of the total cost of operating the section of the line beyond the segment based on costs derived on a car-mile basis, and of that estimated sum a portion was charged to the segment for handling the traffic beyond in the same ratio as the segment revenue from traffic other than local bears to the revenue of the entire line. For instance, in the case of the Santa Monica-Beverly Hills line, the 1938 revenue from segment traffic moving beyond was \$140,521, or 52.13 percent of \$269,558, the total line revenue. The total estimated cost of operating the section of line beyond the point proposed to be abandoned is \$150,960, so that the proportional amount charged for handling the traffic beyond the segment is 52.13 percent of that amount, or \$78,695. The principal tax charged was an ad valorem tax based on the assessed values of the properties.

The applicant's income accounts for the past 15 years indicate that operations of the entire railroad have resulted in substantial net losses. During the period 1927-33 railway operating revenues declined from approximately \$19,000,000 to about \$9,000,000. The revenues for the last four years have fluctuated between \$10,000,000 and \$11,000,000. Expenditures for maintenance of way and structures for each of the last nine years have been approximately but half, or less, of the amount appropriated for that purpose in 1927, resulting in the accrual of large amounts of deferred maintenance. It was stated that on that account there is urgent need of material increases in expenditures for maintenance if the applicant's lines are to be kept in operation and render satisfactory service to the public. For the past eight years the applicant has incurred deficits in net railway operating income ranging from \$17,743 in 1936 to \$826,505 in 1938, and a deficit of \$608,989 in 1939.

50 The Southern Pacific Company from time to time has made advances to the applicant for capital additions and betterments, for operating expenses when not earned, and for the payment of interest on the outstanding bonds held by the public. The applicant is indebted in open account to the Southern Pacific to the extent of approximately \$50,000,000. According to estimates made by the State commission in proceedings before it, the gross revenues received by the Southern Pacific on freight inter-

changed with the Pacific Electric Company, in 1937 amounted to \$4,591,417, resulting in a profit of \$1,836,567, if the out-of-pocket cost of handling the business is based on 60 percent of the gross revenues, and \$1,377,425 if the cost is based on 70 percent. It was estimated that in the absence of the present corporate relationship between the Southern Pacific and the applicant the former's gross revenue from the latter's traffic would be more than \$1,000,000 less than under existing affiliations. It was also estimated that the Atchison, Topeka & Santa Fe Railway Company's share of the freight moving to or from the lines of the Pacific Electric was \$662,019, while that of the Union Pacific amounted to approximately \$1,000,000.

Future expenses, if the segments are continued in operation as at present, for ordinary maintenance of way and structures are expected to increase in the next seven years from \$79,906 in 1940 to \$190,894 in 1944 and each year thereafter, exclusive of an expenditure of \$866,600 within the next five years for reconstruction of tracks and paving of city streets. The proposed abandonments would eliminate expenses in maintenance of way, including expenses for reconstruction and paving, averaging about \$303,400 a year for a 7-year period. The cost of maintaining way and structures of the entire railroad if present operations continue without change would average approximately \$1,897,284 a year, based on the same number of years.

In advocating the proposed program of rearrangement the applicant states that it was not motivated by the excessive cost of rehabilitating the rail equipment, as its cost is practically the same as that for motor coaches, but rather by the expenditures which would be required for maintenance and rehabilitation of the line itself and the public preference for motor transportation. Based upon studies begun in 1935 and completed in August, 1939, it concluded that the proposed abandonments, substitutions, and changes would result in an increased net operating benefit of \$1,199,022 a year. The studies embrace changes not yet presented either to this commission or to the State commission. It is stated that in arriving at the increased net operating benefit consideration was given to deferred maintenance, depreciation of equipment, increased revenue as the result of the elimination of the unprofitable segments, improvement in service, and operating savings in power, equipment, maintenance, and taxes.

Comparisons of the present rail operations with the proposed operations in connection with the main segments have been submitted. Where the segment is part of a line, the cost of operation embraces the entire line, as well as its corresponding motor service. Where dual operation is performed, the

expenses of the portion jointly used are prorated. The estimate shows revenues, out-of-pocket expenses, and net out-of-pocket profit or loss under (a) present rail operation, (b) continued rail operations with present equipment and type of service based on a 5-year average, and (c) the proposed motor operation. The rail out-of-pocket cost consists principally of expenses for maintenance of way and structures, maintenance of equipment, power, wages of trainmen, cleaning and lubricating cars, and taxes. The aggregate net out-of-pocket profit or loss shown is a total profit of \$63,398 under present rail operations, a deficit of \$131,176 under continued rail operation, and a profit of \$441,927 under the proposed motor coach service, or a gain under proposed over present operations of \$378,229. The estimate, according to the witness, is based upon the theory that rail operating revenues will decrease in the next five years and expenses of maintenance of way and structures will increase. The motor-coach operations are estimates based on the applicant's experience in that field.

The Railway Labor Executives' Association and the Brotherhood of Railroad Trainmen are the only protestants showing active opposition to the granting of the application. No witnesses appeared in their behalf. Counsel for the labor organizations submitted a copy of an agreement between the applicant and the Brotherhood of Railroad Trainmen relative to rates of pay, working conditions, and other incidental matters, and also a copy of what is known as the job protective agreement entitled "Agreement of May 1936, Washington, D. C.," entered into between a large number of railroad companies, exclusive of the applicant, and railway labor executives.

The labor organizations, at times hereinafter referred to as the protestants, contend that the operation of motor busses under the proposed plan will aggravate an already acute traffic congestion on the highways, particularly in and about the City of Los Angeles, the rail operations being conducted to a large extent over privately owned rights-of-way.

It is conceded by the protestants that the proposed abandonment would strengthen the operating and financial position of the applicant and its parent company, the Southern Pacific, but they contend that the plan would be effected largely at the expense of employees. The protestants estimate the profit to the Southern Pacific from freight traffic interchanged with the Pacific Electric at \$160,353 a year. The estimate is arrived at by using the 1937 profit of \$1,836,567 and deducting therefrom \$1,676,214, which represents the interest paid by the Southern Pacific on the applicant's bonded debt. The latter figure was determined by subtracting from the applicant's 1939 deficit in net income of \$2,918,734 a sum equal to 52 percent of \$2,289,462 charged to interest on funded debt in

330. The protestants conclude that this whole program of rearrangement is for the benefit of the Southern Pacific.

2 In 1936 the applicant's force of employees was reduced from about 7,500 to 3,500 men. The number employed at present is approximately 4,000. The rehabilitation program is expected to result in an increase in employment, but if it should cause displacement of train-service employees the applicant is unwilling to pay compensation for loss of employment. However, an effort would be made to replace any such employee in other departments, wherever possible, until such time as employment would become available in the transportation department. Of approximately 32 men recently displaced because of reduction in service in Long Beach and discontinuance of service on the Gardena-Redondo line, and the Torrance branch, 15 men are at present out of employment, but the applicant expects to reinstate them during the current year. The Sawtell segment is operated by approximately 50 motormen and conductors, one-half of whom would be removed from their present positions under the rearrangement program. There will be removals from other segments as well, in numbers unknown at present. Nevertheless the applicant anticipates absorption of all displaced employees in the ordinary turnover resulting from death, retirement, disability, and resignation. Some will qualify as motor bus operators. All these anticipations are based largely on past experiences.

Exhibits submitted by the applicant show the ages of trainmen and motor coach operators, seniority of train service employees, rate of pay to train and motor coach service employees, skilled shop labor, and construction and maintenance-of-way forces. Of the trainmen and motor coach operators 454 are under 40 years of age, 81 are 40 years and over, 406 are 50 years and over, and 102 are 60 years and over. Based on information contained therein, the protestants estimate that of the train-service employees, 19 have seniority of less than one year, 317 have one year and less than 10 years, 307 have 10 years and less than 15 years, and, 843 have 15 years and over. The hourly rate of pay to train and motor coach service employees since October 1, 1937, has ranged from 63.5 cents to 99.7 cents.

Other estimates of the protestants, also based on information submitted by the applicant, show that wages to rail motor men and conductors would be reduced to the extent of \$290,968 annually, while wages of motor coach drivers will increase by \$79,599 a year, resulting in a net annual loss of wages of train and bus operators of \$211,369; and that additional wage losses would occur in the maintenance of way and maintenance of equipment departments, amounting to \$125,565, which would be offset by wage increases in truck operations of about \$34,938, or a net loss of \$90,627. Wages



in the maintenance departments were ascertained on the basis of certain percentages which, according to the applicant, represent the labor cost ranging from 60 to 70 percent of the total expenses in that field. According to the foregoing calculation, the aggregate saving of \$378,229 under the proposed plan includes a total of \$301,996 as the cost of labor.

In the event of abandonment the protestants seek the imposition of conditions for the protection of the interest of employees substantially like those imposed in Chicago, R. I. & G. Ry. Co. Trustees Lease, 230 I. C. C. 181; In Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, the Commission held that it had no authority to attach conditions of that nature in abandonment proceedings. Counsel for the labor organizations contends that in view of the decision in United States v. Lowden, 308 U. S. 225, decided December 4, 1939, holding that the Commission has authority to impose conditions for the protection of railroad employees in proceedings under section 5 (4) of the Interstate Commerce Act, the conclusion reached in Chicago G. W. R. Co. Trackage, supra, is based on an incorrect application of the statute, and that the question of our jurisdiction in such matters should be reconsidered. The protestants argue that the Commission had disclaimed jurisdiction to impose conditions for the protection of employees in abandonment cases on the broad ground that such protection is not connected with "public convenience and necessity," while the Supreme Court has sustained the Commission's jurisdiction to impose similar conditions in consolidation or coordination cases on a similarly broad ground that such protection is a matter of "public interest," and that while the language used in section 1 (18-20) is not precisely the same as that in section 5 (4), there is no significant distinction in meaning between the two sections, the phrases "public convenience and necessity" in the one section and "public interest" in the other being of similar import. Counsel concludes that the results of abandonment of a portion of a railroad system, as in the instant proceeding, are comparable to those secured from a consolidation or coordination of railroads; that in the one case contemplated economies are expected to result from a rearrangement of available facilities in such a manner as to better meet public need, while the other case is predicated upon expected economies to be derived from the elimination of certain duplicated operations or facilities; that in both situations the application is based on the ground that the railroad and the public will benefit by the elimination of wasteful operations; and that in either case the elimination of operations results in loss of employment, so that any public benefit accruing to the carrier is acquired at the expense of a corresponding loss to the employees.

A similar contention was made in *Chicago, S. & St. L. Ry. Co. Receiver Abandonment*, 236 I. C. C. 765, *Tonopah & T. R. Co. Abandonment*, decided May 13, 1940, 240 I. C. C. 145, and other cases. In the latter case the Commission held that imposition of conditions for the protection of employees in abandonment proceedings is outside of the scope of its authority. We are unable to discern in the argument advanced by counsel for the protestants any considerations which would warrant us in departing from the determinations in those proceedings.

Under the proposed plan of rearrangement the public will continue to receive common-carrier transportation in cases where motor coach service will be substituted for that proposed to be discontinued. Where no substitution in service is contemplated, there is no apparent further public need for it. Substantial savings undoubtedly would be effected by the abandonments but probably not to the extent anticipated by the applicant. Under the circumstances, to continue operation of the lines herein permitted to be abandoned would impose an undue burden upon the applicant and upon interstate commerce.

54 We find that the present and future public convenience and necessity permit (1) abandonment by the Pacific Electric Railway Company of its lines or portions of lines of railroad in Los Angeles, Orange, and Riverside Counties, Calif., described herein, excepting the Venice short line, and the Echo Park Avenue line, as to which the application will be dismissed, and (2) abandonment of operation, under trackage rights, by the Pacific Electric Railway Company over the line of the Union Pacific Railroad Company in Riverside and San Bernardino Counties, in said State, also described herein. An appropriate certificate and order will be issued, effective from and after 40 days from its date, in which suitable provision will be made for the cancelation of tariffs.

PORTER, Commissioner, dissenting in part:

I agree with this report as to the abandonments authorized, but I have long been of the opinion that we have ample power to attach reasonable conditions for the protection of the employees in abandonment cases such as this one, and I believe we should do so here. I am reinforced, in my judgment, by the reasoning employed by the Supreme Court in the case of *United States v. Lowden*, 308 U. S. 225.

#### CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 28th day of August A. D. 1940.

## Finance Docket No. 12643

## PACIFIC ELECTRIC RAILWAY COMPANY ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit (1) abandonment by the Pacific Electric Railway Company of lines or portions of lines of railroad in Los Angeles, Orange, and Riverside Counties, Calif., excepting the so-called Venice short line and the Echo Park Avenue line, and (2) abandonment of operation, under trackage rights, by the Pacific Electric Railway Company over the line of the Union Pacific Railroad Company in Riverside and San Bernardino Counties, in said State; as described in the report aforesaid.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable on said lines of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the Pacific Electric Railway Company, when filing schedules canceling tariffs applicable on said lines of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

It is further ordered, That the Pacific Electric Railway Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That the part of the application seeking permission to abandon the Venice short line and the Echo Park Avenue line in said Los Angeles County be, and it is hereby, dismissed.

By the Commission, division 4.

[SEAL]

W. P. BARTEL, *Secretary*.

56

In United States District Court

[Title omitted.]

*Summons*

To the above-named Defendants:

You are hereby summoned and required to serve upon Edward C. Kriz, plaintiff's attorney, whose address is 1416 F Street NW., Washington, D. C., an answer to the complaint which is herewith served upon you, within sixty days after service of this summons

upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[SEAL OF COURT]

CHARLES E. STEWART,  
*Clerk of Court.*

By C. B. COFLIN,  
*Deputy Clerk.*

Date: November 8, 1940.

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

57

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the — day of — 19—, I received the within summons and copy of application for temporary suspension of Interstate Commerce Commission order.

(1) United States of America, by Edward M. Curran, U. S. Attorney, personally, November 9, 1940.

(2) Interstate Commerce Commission, by W. P. Bartel, Secretary, personally, November 12, 1940.

JOHN B. COLPOYS,  
*United States Marshal.*

J. S. MCCARTHY,  
By T. R. EAST,  
*Deputy United States Marshal.*

L.

Marshal's fees: Travel, \$——. Service, \$1.00.

Subscribed and sworn to before me, a —, this — day of — 19—.

[SEAL]

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

58

District Court of the United States for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Order*

Filed Nov. 12, 1940

To the honorable the Chief Justice or Senior Associate Justice of the United States Court of Appeals for the District of Columbia:

A request having been duly made for the convening of a district Court of three judges to hear and dispose of the above-entitled



**44 UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N**

cause, and it appearing that, pursuant to the provisions of Title 28, Sect. 47, U. S. C. A., this cause is one which must be heard and disposed of by a district court of three judges, at least one of whom must be a circuit judge.

You are hereby requested to designate a justice or two justices of the United States Court of Appeals for the District of Columbia to sit on a district court of three judges to hear and dispose of the above-entitled cause.

**ALFRED A. WHEAT,**  
*Chief Justice, District Court of the  
United States for the District of Columbia.*

**NOVEMBER 12, 1940.**

**59 District Court of the United States for the  
District of Columbia**

**Civil Action No. 9011**

**RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL., PLAINTIFFS VS.  
UNITED STATES OF AMERICA ET AL., DEFENDANTS**

**Filed Nov. 14, 1940**

*Order Convening Three-Judge Court*

Upon consideration of the Complaint heretofore filed herein, the application for a Temporary Suspension and other relief against the Order entered on the 28th day of August, 1940, by the Interstate Commerce Commission in a certain cause entitled Pacific Electric Railway Company Abandonment, numbered Finance Docket No. 12643 before said Commission, and it appearing to the Court that this action is one which comes within the purview of Title 28, Section 47, U. S. C. A., and on motion of counsel for plaintiffs, it is, by the Court, this 14th day of November, 1940:

Ordered, that there be, and hereby is, convened a three-judge Court under the terms and provisions of Title 28, Section 47, U. S. C. A., for the purpose of hearing and disposing of the above entitled cause. And it is further hereby:

Ordered, that I, Alfred A. Wheat, Chief Justice of the District Court of the United States for the District of Columbia, hereby call to my assistance to hear and consider this matter, Chief Justice D. Lawrence Groner, and Associate Justice Fred M. Vinson, of the United States Court of Appeals for the District of Columbia, heretofore designated by the Chief Justice of that Court to serve with me. And it is further hereby

Ordered, that the 25th day of November, 1940, at 10:30 o'clock A. M. be fixed as the time of said hearing, and the Court Room of the United States Court of Appeals for the District of Columbia, be fixed as the place where said matter shall be heard.

ALFRED A. WHEAT,  
*Chief Justice.*

60

UNITED STATES COURT OF APPEALS,  
FOR THE DISTRICT OF COLUMBIA,  
*Washington, D. C., November 13, 1940.*

Joseph W. Stewart, Clerk. C. Newell Atkinson, Deputy Clerk  
Civil No: 9011, Railroad Labor Executives Association v. United  
States of America and Interstate Commerce Commission.

Colonel CHARLES E. STEWART,  
*Clerk, District Court of the United States  
for the District of Columbia,  
Washington, D. C.*

MY DEAR COLONEL STEWART: I understand that the above entitled case is scheduled for hearing before a three-judge statutory court consisting of Chief Justice Groner, Judge Vinson, and Chief Justice Wheat, on November 25, 1940, at 10:30 a. m., in the courtroom of the United States Court of Appeals.

Sincerely yours,

JOSEPH W. STEWART,  
*Clerk.*

Filed Nov. 14, 1940. Charles E. Stewart, Clerk.

J 422960 F 61 2

61 In the District Court of the United States for the  
District of Columbia.

[Title omitted.]

[File endorsement omitted.]

*Answer of the United States of America*

Filed Nov. 18, 1940

Answering the complaint filed against it in this action the United States of America, defendant, says:

1. The allegations of paragraphs 1, 2, 3 and 5 are admitted.
2. For answer to paragraph 4 of the complaint the United States of America admits the following facts:

The Pacific Electric Railway Company on November 13, 1939, applied [to the Interstate Commerce Commission] for permission

(1) to abandon lines or parts of lines of railroad, hereinafter specifically described, aggregating about 88.11 miles in Los Angeles, Orange, and Riverside Counties, California, and (2) to abandon operation, under trackage rights, over a line of the Union Pacific Railroad Company, approximately 8.47 miles, in Riverside and San Bernardino Counties, California, \* \* \*

This application is the result of a general program of rearrangement of the applicant's passenger service, involving abandonment of certain rail lines and substitution of motor coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public.

3. For answer to paragraph 6 of the complaint the United States of America says that it has no knowledge or information sufficient to form a belief as to the truth or accuracy of the allegations contained therein.

62 4. For answer to paragraph 7 of the complaint the United States of America admits that the Interstate Commerce Act contains, in section 1 (20), a provision substantially as quoted in said paragraph 7, but reference is made to the said section of the Act for the complete and correct provisions thereof. The United States of America is advised that all remaining statements contained in paragraph 7 are the plaintiff's statements and conclusions of law, which require no answer.

5. For answer to paragraph 8 of the complaint the United States of America admits the allegations of fact contained therein as to the proceedings before the Interstate Commerce Commission, but refers to the report of the said Commission dated August 28, 1940, which is attached to the complaint as Exhibit C, for a more complete statement of the said proceedings.

6. For answer to paragraph 9 of the complaint the United States of America admits that the Interstate Commerce Commission, acting through Division 4 thereof, duly considered the application of the Pacific Electric Railway Company, referred to in paragraph 2 above, and issued an order granting said application in part, and further admits that the said Commission refused to attach to the certificate of public convenience and necessity which it issued upon the aforesaid application any conditions for the protection of the employees of the applicant affected by the authorized abandonment of certain of applicant's lines of railroad and operating rights. The United States of America denies all other allegations of paragraph 9, and refers to the report and order of the Commission, attached to the com-

plaint as Exhibit C, for full, complete and accurate information as to the scope of the Commission's order and as to the Commission's reasons for its refusal, as aforesaid, to attach to the said order any conditions for the protection of the applicant's employees.

63 7. The United States of America denies the allegations of paragraphs 10, 11, and 12 of the complaint.

8. Except as herein expressly admitted the United States of America denies each and every allegation contained in the several sections of the complaint.

Wherefore, the defendant the United States of America prays that the complaint be dismissed at the cost of the plaintiffs, and for such other and further relief as may be proper.

S. R. BRITTINGHAM, Jr.,

S. R. Brittingham, Jr.,

*Special Assistant to the Attorney General,*

*Department of Justice, Washington, D. C.,*

*Counsel for the United States.*

THURMAN ARNOLD,

*Assistant Attorney General.*

FRANK COLEMAN,

*Special Assistant to the Attorney General.*

EDWARD M. CURRAN, Esq.,

*United States Attorney.*

I certify that a true copy of the foregoing Answer of the United States of America was this day mailed to the following persons:

E. M. REIDY, Esq.,

*Interstate Commerce Commission,*

*Counsel for Interstate Commerce Commission.*

EDWARD C. KRIZ, Esq.,

*1416 F. Street, NW., Washington, D. C.*

FRANK L. MULHOLLAND, Esq.,

*CLARENCE W. MULHOLLAND, Esq.,*

*1041 Nicholas Building, Toledo, Ohio,*

*WILLARD H. McEWEN, Esq.,*

*1040 Nicholas Building, Toledo, Ohio,*

*Counsel for Plaintiffs.*

S. R. BRITTINGHAM, Jr.,

S. R. Brittingham, Jr.,

*Special Assistant to the Attorney General.*

NOVEMBER 16, 1940.



64 In the District Court of the United States for the  
District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Answer of Interstate Commerce Commission*

Filed Nov. 25, 1940

The Interstate Commerce Commission, defendant in the above-entitled action, hereinafter referred to as the Commission, for answer unto so much or such parts of plaintiffs' bill of complaint as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs 1, 2, and 3, of the bill of complaint, the Commission admits the allegations thereof.

II

Answering paragraph 4 of the bill of complaint, the Commission respectfully refers the court to the Commission's report, attached to and made a part of the complaint as Exhibit C, for a more full and complete statement of the facts than is contained in said paragraph 4. To the extent that the allegations of said paragraph are inconsistent with the statements and findings contained in said report, the Commission denies them.

III

The Commission, in answer to the allegations of paragraph 5 of the bill of complaint, admits same.

IV

Answering paragraph 6 of the bill of complaint, the Commission disclaims information sufficient to form a belief as to the truth and accuracy thereof.

V

Answering paragraph 7 of the bill of complaint, the Commission admits that the provisions of paragraph (20) of Section 1 of the Interstate Commerce Act, in part, are accurately set forth therein. The Commission alleges that the remaining allegations contained in said paragraph 7 require no answer, being conclusions of law.

## VI

Answering paragraph 8 of the bill of complaint, the Commission admits the allegations thereof, but for a more full and complete statement of the facts, respectfully refers the court to its report and certificate, made a part of the complaint as Exhibit C.

66

## VII

Answering paragraph 9 of the bill of complaint, the Commission admits the consideration and decision by Division 4 of the application therein referred to. As reasons for its refusal to attach to its report the conditions referred to, the Commission respectfully refers the court to Exhibit C to the bill of complaint, its decision in this proceeding, for a more full and complete answer to the allegations of this paragraph. The Commission denies that its action was erroneous or unlawful in any respect.

## VIII

Answering the allegations of paragraph 10 of the bill of complaint, the Commission denies said allegations.

## IX

Answering the allegations of paragraph 11, the Commission admits that said plaintiffs and the employees they represented appeared before the Commission in this proceeding and were fully heard. The other allegations of said paragraph are denied.

## X

Answering the allegations of paragraph 12 of the bill of complaint, the Commission admits that plaintiffs applied to the Commission for a rehearing of the decision of Division 4, which petition was denied by the entire Commission. The Commission denies the other allegations of the paragraph.

67

## XI

Further answering the allegations of the bill of complaint, the Commission alleges that at the hearings held on the application referred to in paragraph 5 of the bill of complaint, the Commission considered testimony and other evidence submitted on behalf of the plaintiffs herein by counsel for said plaintiffs; that at said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of

said parties by their respective counsel, including questions raised by plaintiffs in this action, whereupon the Commission determined said matters and entered and duly served upon the plaintiffs herein, and upon other interested parties, its report and certificate, Exhibit C to the bill of complaint.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties in said proceeding by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

68 Answering the allegations of the bill of complaint, the Commission denies that in issuing its report and certificate hereinbefore referred to, it exceeded its statutory power or acted arbitrarily, unreasonably or erroneously in any respect. The Commission denies that its said report and certificate are invalid for the reasons set out in said bill of complaint, or for any other reason.

Further answering the allegations of the bill of complaint, the Commission denies that plaintiffs will suffer irreparable injury as a result of the Commission's decision in this proceeding.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report and certificate, hereinbefore referred to.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

INTERSTATE COMMERCE COMMISSION,  
By E. M. REIDY.

DANIEL W. KNOWLTON,  
Chief Counsel,  
Of Counsel.

69 [Duly Sworn to by Joseph Eastman; jurat omitted in printing.]

70

In the District Court of the United States  
for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Order permitting intervention*

Filed March 15, 1941

It appearing that Pacific Electric Railway Company is a party in interest in the above-entitled matter, having been the applicant in Finance Docket 12643, Pacific Electric Railway Company Abandonment, the proceeding before the Interstate Commerce Commission out of which this action grew and the order in which proceeding is herein attacked; and it appearing that on November 25, 1940, in open court said Pacific Electric Railway Company by counsel requested, and the court granted, leave to intervene and to file answer herein as a defendant by intervention and to participate in the hearing and argument herein, and it further appearing that Pacific Electric Railway Company is entitled under Judicial Code, Title 28, Section 45a, of the U. S. Code and under the Rules for Civil Procedure for the District Courts of the United States to intervene and be treated as a party defendant herein;

It is ordered, that said Pacific Electric Railway Company be, and it is hereby, permitted to intervene herein as a party defendant.

D. LAWRENCE GRONER,  
*Chief Justice, Court of Appeals*  
*for the District of Columbia.*

MARCH 15th, 1941.

71 Copy of the order permitting intervention and Mr. Bell's letter of March 14, 1941, to Chief Justice Groner, is received and the undersigned consent to the entry of the order as requested as of November 25, 1940.

EDWARD C. KRIZ,  
*Counsel for Plaintiffs.*  
SMITH R. BRITTINGHAM, Jr.,  
*Counsel for the United States.*  
E. M. REIDY,

*Counsel for Interstate Commerce Commission.*

Dated at Washington, D. C., March 14, 1941.



SOUTHERN PACIFIC COMPANY,  
LAW DEPARTMENT, 205 TRANSPORTATION BUILDING,  
Washington D. C., March 14, 1941.

J. R. Bell, General Attorney and Commerce Counsel

G. H. Muckley, Assistant General Attorney

Civil Action No. 9011—Railway Labor Executives' Association  
et al. v. United States of America et al.

HON. D. LAWRENCE GRONER,

Chief Justice, United States Court of Appeals,  
Washington, D. C.

DEAR JUDGE GRONER: On November 25, 1940, the above case was heard by you and Justices Vinson and Wheat, sitting at a statutory court. Opinion was handed down on March 6, 1941. Upon investigation of the record in considering the possibility of appeal to the United States Supreme Court, it was found that the record does not show that permission was granted the Pacific Electric Railway Company to intervene as a defendant.

At the hearing Mr. Frank Karr, General Counsel of the Pacific Electric Railway Company, residing at Los Angeles, California, asked leave in open court on behalf of the Pacific Electric Railway Company to intervene as a defendant, to file an answer, and to participate in the hearing and argument. This request was granted and Mr. Karr did file an answer on November 25, 1940, as shown by the journal entry of the Clerk of the court. You will no doubt recall that Mr. Karr also made an oral argument.

The record, however, does not show the entry of an order permitting the intervention, due no doubt to the fact that no written order was presented to the court at the time. So that the record will definitely show the fact that the Pacific Electric Railway Company was permitted to intervene as a defendant, it is respectfully requested that the attached order be entered as of November 25, 1940, the date the intervention actually was permitted in open court and the date the case was heard.

Copy of this letter and the attached order have been sent to counsel for plaintiffs, Mr. Edward C. Kriz, to Mr. S. R. Brittingham, Jr., Special Assistant to the Attorney General, counsel for the United States, and to Mr. E. M. Reidy, Assistant Chief Counsel of the Interstate Commerce Commission, who have signified their approval of the entry of this order by their O. K. which is attached to the order.

Very truly yours,

J. R. BELL.

Encl.

cc-Messrs. Edward C. Kriz, S. R. Brittingham, Jr., E. M. Reidy.

74 In the United States District Court for the District  
of Columbia

[Title omitted.]

[File endorsement omitted.]

*Answer of defendant in intervention, Pacific Electric Railway  
Company*

Filed Nov. 25, 1940

Comes now the defendant in intervention, Pacific Electric  
Railway Company, a corporation, and in answer to plaintiffs'  
complaint admits, denies, and alleges as follows:

I

75 That defendant, in intervention, Pacific Electric Railway Com-  
pany, is a corporation duly incorporated and consolidated  
under and by virtue of the laws of the State of California,  
having its principal place of business in the City of Los  
Angeles, County of Los Angeles, State of California.

II

This defendant admits the allegations of paragraph 1, para-  
graph 2, paragraph 3, paragraph 5, and paragraph 8 of plain-  
tiffs' complaint.

III

Answer paragraph 4 of plaintiff's complaint, this defendant  
averts that for some years prior to the filing on November 13,  
1939, its application for abandonment of the lines of railroad  
referred to in Finance Docket No. 12643 before the Interstate  
Commerce Commission and entitled "Pacific Electric Railway  
Company Abandonment," this defendant Pacific Electric Railway  
Company operated its railroad at substantial losses, as is more  
particularly shown in the sheet entitled "Pacific Electric Railway  
Company Exhibit of Net Income and Operating Statistics Years  
1925 to 1939, Inclusive", hereto attached and by reference made  
a part hereof, and marked "Exhibit A"; and this defendant, in  
an attempt to place itself in a position where it would earn its  
operating expenses and if possible avoid a bankruptcy or reor-  
ganization proceeding, prepared a rehabilitation program which  
was designed to reduce the losses theretofore incurred, and in  
carrying out said rehabilitation program reduced and in some  
instances discontinued passenger rail service over some of its  
lines, and in other instances sought to abandon certain rail lines

entirely as alleged in plaintiffs' complaint, in other instances installed motor coach service on lines where rail service was reduced but not discontinued, in other instances installed motor coach service in lieu of rail service discontinued on lines not sought to be abandoned, in other instances substituted motor coach service for reduced passenger service on the lines authorized to be abandoned which will not be resumed on such rail lines which have been authorized by the Interstate Commerce Commission to be abandoned. Defendant admits that said plan did not contemplate the withdrawal of Pacific Electric Railway Company entirely from passenger service, but in the instances hereinbefore referred to, motor coach service is substituted for the rail passenger traffic theretofore handled.

## IV

Answering paragraph 6 of plaintiffs' complaint, this defendant denies that its employees will experience, as a result of abandonments authorized by the Interstate Commerce Commission in this case, an annual net wage loss to the extent of approximately \$301,896.10, or any other sum in excess of \$1,000.00 per month for a period not to exceed nine months. Defendant avers that its individual employees may sustain a maximum total wage loss of not to exceed \$9,000.00 during a period of not to exceed nine months from November 17, 1940, but this defendant within said nine months will absorb back into its service all such employees in the ordinary turnover that results from death, retirement, disability, and resignation. However, the allegations of the complaint in regard to the amount of wage loss are not relevant or material to the issue here presented.

Defendant admits that many of the employees of Pacific Electric Railway Company have devoted a large portion of their productive lives to the service of Pacific Electric Railway Company and have acquired valuable property rights of seniority in connection with their employment; but in that behalf defendant avers that none of the employees of Pacific Electric Railway Company who have been or will be affected by any reduction of employment have had long or any service with the Pacific Electric Railway Company in excess of two years, and denies that many of said employees, or any of said employees, will be unable to secure other employment in the event of their dismissal by the Pacific Electric Railway Company, or will suffer great or any hardship by reason thereof, or will

become public charges, with the exception of one man who voluntarily discontinued his service and elected to go on relief in lieu thereof.

Defendant denies that uncertainty as to their economic future has subjected labor relations between these employees, or any employees, and the Pacific Electric Railway Company to severe stress, or any stress, which uncertainty or stress have been communicated to other employees, or any employees, of this carrier on other lines not affected by this application, or any lines, and denies that from all of which or anything else impairment of employees' morale has resulted. Defendant denies that all of the above or anything alleged in paragraph 6 of plaintiffs' complaint vitally affects the interests, or at all affects the interests, convenience, or necessity of the public in the premises other than to the extent that the public interest has been benefited and advanced by the substitution of a modern up to date motor coach service in lieu of the rail passenger service discontinued.

## V

Answering paragraph 7 of plaintiffs' complaint, defendant alleges that the part of Paragraph 20 of Section 1 of the Interstate Commerce Act there quoted, read in connection with other provisions of the law, particularly the provisions of Paragraph 18 of Section 1 in regard to abandonments, is self-explanatory, and denies that the Interstate Commerce Commission is directed by or has any authority under such statute to consider or impose conditions or requirements respecting employees in an abandonment proceeding in determining and deciding whether or not the authorization of such abandonment is permitted by the present or future public convenience and necessity.

## VI

78. Defendant admits all of the allegations of paragraph 9 of plaintiffs' complaint, except that defendant denies that the conclusion of the Interstate Commerce Commission was erroneous, and denies that the language of the Interstate Commerce Act gives to the Interstate Commerce Commission any authority to impose conditions for the protection of employees such as those suggested by the plaintiffs in abandonment cases, or to give any consideration to the effect of abandonment upon employees.



## VII

Answering paragraph 10 of plaintiffs' complaint, defendant denies that the ruling and decision quoted and referred to of defendant Interstate Commerce Commission is erroneous, or that the order and certificate based therein are likewise erroneous, or that they should be set aside.

## VIII

Answering paragraph 11 of plaintiffs' complaint, defendant denies that said ruling and decision of the defendant Interstate Commerce Commission, or any decision thereof, will deprive the plaintiffs, or any thereof, or the employees of the Pacific Electric Railway Company, or any thereof, of the enjoyment of valuable or any property rights in their employment as set forth in the complaint. Defendant denies that the order of the defendant Interstate Commerce Commission referred to in the complaint, or any order of said Interstate Commerce Commission, denies to the plaintiffs, or any thereof, or to said employees, or any thereof, the enjoyment of this right, or any right, by holding that in no case, or under no circumstances can the effect of the abandonment of railroad trackage upon employees be considered in relation to the convenience and necessity of the public.

## IX

Answering paragraph 12 of plaintiffs' complaint, defendant denies that plaintiffs, or any thereof, or the employees of the Pacific Electric Railway Company, or any thereof, represented by plaintiffs, or any employees of Pacific Electric Railway Company are threatened with irreparable injury, or any injury, on account of the order of the Interstate Commerce Commission in that they are subject to the loss of position, compensation, rights of seniority or other property rights, or anything else, or at all, if the rail lines mentioned in the application of the Pacific Electric Railway Company are abandoned; and defendant denies that in this proceeding they were denied all opportunity, or any opportunity, to present the effect of their loss in relation to the public convenience and necessity. Defendant denies that for this alleged injury the plaintiffs or those represented by them have no remedy save by this action. Defendant denies that the plaintiffs or those represented by them have no remedy at law in the premises by action for damages or otherwise, or no other remedy whatsoever save by complaint to this Court.



## Exhibit A

## PACIFIC ELECTRIC RAILWAY COMPANY

## EXHIBIT OF NET INCOME AND OPERATING STATISTICS, YEARS 1925 TO 1939 INCLUSIVE

	1939	1938	1937	1936	1935	1934	1933	1932	1931	1930	1929	1928	1927	1926	1925
<b>RAILWAY OPERATING REVENUES</b>															
Passenger:															
Railway	\$5,217,848	\$5,454,410	\$5,855,963	\$5,804,737	\$5,469,820	\$5,188,894	\$5,265,414	\$5,251,000	\$7,930,779	\$9,285,409	\$10,259,799	\$10,377,873	\$11,133,542	\$11,380,630	\$11,714,930
Motor Coach	2,042,619	1,740,646	1,717,669	1,442,397	1,188,771	1,091,072	1,048,403	1,117,926	1,279,621	1,403,788	1,373,179	1,165,789	1,033,067	943,764	877,415
Freight	2,741,306	2,603,445	2,860,156	2,808,754	2,329,995	1,979,473	2,027,040	2,315,592	2,990,844	3,798,485	5,332,015	5,396,004	6,029,595	5,795,491	5,947,157
Mail	83,339	83,664	87,973	84,028	82,454	84,966	89,062	97,396	101,330	102,660	98,140	94,013	90,580	89,840	78,290
Express	159,833	170,690	161,009	148,287	138,464	124,533	103,964	106,253	188,178	245,859	268,537	250,359	255,889	236,582	227,995
Switching	135,714	103,061	116,331	99,493	79,073	70,003	56,555	54,587	71,836	84,050	184,363	204,457	302,777	264,895	207,158
Other Transportation	19,542	16,318	18,091	35,845	55,150	25,310	21,221	29,232	21,809	30,328	47,222	20,322	21,346	24,138	13,414
Revenue from Other Railway Operations	895,261	889,245	831,717	443,617	436,888	400,450	451,131	561,660	697,222	765,781	854,080	742,171	747,745	375,824	447,996
<b>Total Railway Operating Revenues</b>	<b>\$11,295,462</b>	<b>\$11,061,479</b>	<b>\$11,648,939</b>	<b>\$10,957,158</b>	<b>\$9,780,615</b>	<b>\$9,004,701</b>	<b>\$9,062,840</b>	<b>\$10,533,655</b>	<b>\$13,281,619</b>	<b>\$15,662,300</b>	<b>\$18,417,335</b>	<b>\$18,310,988</b>	<b>\$19,614,541</b>	<b>\$19,111,164</b>	<b>\$19,514,325</b>
<b>OPERATING EXPENSES</b>															
Way and structures	\$1,175,057	\$1,257,485	\$1,411,996	\$1,111,392	\$957,391	\$915,488	\$846,700	\$1,089,434	\$1,551,475	\$2,024,773	\$2,654,780	\$2,988,208	\$3,105,504	\$3,110,063	\$2,710,630
Equipment	1,316,470	1,253,901	1,311,925	1,321,966	1,112,670	1,051,316	995,998	1,238,247	1,576,194	1,911,588	2,142,904	2,278,480	2,432,535	2,478,478	2,245,130
Power	1,032,493	1,000,940	1,171,249	1,157,568	1,097,176	1,099,346	1,221,095	1,274,740	1,431,400	1,599,523	1,687,990	1,716,621	1,624,350	1,785,631	1,761,778
Conducting transportation	3,008,236	4,937,447	4,943,373	4,263,269	3,983,908	3,526,718	3,446,299	3,913,324	4,871,213	5,551,737	5,949,951	6,051,506	6,107,019	6,078,708	6,131,491
Traffic	141,678	138,173	180,229	220,462	171,102	181,070	169,407	41,557	235,202	285,430	266,618	301,057	221,305	203,429	259,066
General and miscellaneous	2,033,387	2,023,942	2,145,195	2,094,795	2,063,868	2,064,655	1,966,951	2,010,006	2,394,732	2,676,871	2,839,299	2,983,307	2,897,901	2,797,221	2,929,233
Transportation for investment - Credit	2,008	7,442	8,272	7,439	3,873	4,479	6,662	1,810	9,010	21,008	42,222	63,228	47,159	40,879	58,684
<b>Total Railway Operating Expenses</b>	<b>\$10,704,703</b>	<b>\$10,674,446</b>	<b>\$11,168,695</b>	<b>\$10,132,043</b>	<b>\$9,382,242</b>	<b>\$8,833,514</b>	<b>\$8,639,788</b>	<b>\$9,909,188</b>	<b>\$12,051,266</b>	<b>\$13,998,914</b>	<b>\$15,499,320</b>	<b>\$15,876,041</b>	<b>\$16,351,455</b>	<b>\$16,404,651</b>	<b>\$15,976,044</b>
<b>Net Revenue from Railway Operations</b>	<b>\$590,759</b>	<b>\$387,033</b>	<b>\$480,244</b>	<b>\$825,115</b>	<b>\$398,373</b>	<b>\$171,187</b>	<b>\$423,052</b>	<b>\$594,467</b>	<b>\$1,230,353</b>	<b>\$1,663,446</b>	<b>\$2,918,015</b>	<b>\$2,434,947</b>	<b>\$3,263,086</b>	<b>\$2,706,531</b>	<b>\$3,538,281</b>
Taxes assignable to Railway Operations	\$1,199,748	\$1,213,538	\$1,168,306	\$842,858	\$900,889	\$494,998	\$580,037	\$685,621	\$938,165	\$1,082,934	\$1,112,611	\$1,138,742	\$1,113,665	\$1,143,352	\$1,184,699
<b>Net Railway Operating Income</b>	<b>\$908,989</b>	<b>\$826,505</b>	<b>\$687,962</b>	<b>\$17,743</b>	<b>\$302,116</b>	<b>\$325,111</b>	<b>\$156,985</b>	<b>\$121,154</b>	<b>\$292,188</b>	<b>\$580,512</b>	<b>\$1,805,404</b>	<b>\$1,296,205</b>	<b>\$2,149,421</b>	<b>\$1,563,181</b>	<b>\$2,353,582</b>
<b>Nonoperating Income</b>	<b>138,381</b>	<b>126,876</b>	<b>261,116</b>	<b>316,074</b>	<b>225,115</b>	<b>159,146</b>	<b>193,196</b>	<b>197,125</b>	<b>220,898</b>	<b>331,485</b>	<b>376,658</b>	<b>394,522</b>	<b>243,797</b>	<b>381,788</b>	<b>539,355</b>
<b>Gross Income</b>	<b>\$470,008</b>	<b>\$999,629</b>	<b>\$426,846</b>	<b>\$298,331</b>	<b>\$22,499</b>	<b>\$164,665</b>	<b>\$36,501</b>	<b>\$75,971</b>	<b>\$513,059</b>	<b>\$941,997</b>	<b>\$2,182,062</b>	<b>\$1,690,727</b>	<b>\$2,393,218</b>	<b>\$1,944,940</b>	<b>\$2,892,937</b>
<b>Deductions from Gross Income:</b>															
Interest on funded debt	\$2,389,462	\$2,403,363	\$2,416,905	\$2,441,883	\$2,439,041	\$2,449,035	\$2,468,670	\$2,484,607	\$2,564,621	\$2,632,669	\$2,638,121	\$2,648,287	\$2,692,565	\$2,704,393	\$2,712,701
Amortization of discount on funded debt	58,864	63,944	81,501	81,621	81,610	81,554	82,205	82,530	83,620	83,793	83,793	83,793	83,793	83,793	83,793
Other Deductions			57,130	59,332	64,271	84,068	100,028	106,379	119,302	175,357	175,708	198,548	213,564	252,706	320,858
<b>Total Deductions from Gross Income</b>	<b>\$2,448,126</b>	<b>\$2,548,755</b>	<b>\$2,555,536</b>	<b>\$2,582,836</b>	<b>\$2,584,922</b>	<b>\$2,614,657</b>	<b>\$2,650,903</b>	<b>\$2,673,516</b>	<b>\$2,767,543</b>	<b>\$2,911,819</b>	<b>\$2,907,622</b>	<b>\$2,930,628</b>	<b>\$2,980,922</b>	<b>\$3,040,982</b>	<b>\$3,117,352</b>
<b>Net Income (Black) or Loss (Red)</b>	<b>\$2,918,734</b>	<b>\$3,248,384</b>	<b>\$2,982,382</b>	<b>\$2,284,505</b>	<b>\$2,562,423</b>	<b>\$2,779,322</b>	<b>\$2,614,402</b>	<b>\$2,597,545</b>	<b>\$2,254,487</b>	<b>\$1,969,822</b>	<b>\$715,460</b>	<b>\$1,249,901</b>	<b>\$596,704</b>	<b>\$1,096,033</b>	<b>\$221,415</b>

NOTE: - Operating revenues, operating expenses, and taxes include operations of motor coaches by the Pacific Electric Railway as well as one-half the operations of the Los Angeles Motor Coach Company.  
 Traffic expenses include net receipts from parks, resorts, and attractions.  
 Operating revenues and operating expenses for years 1927 to 1938 include all revenues and expenses of Pacific Electric Building

in Los Angeles for those years; operating expenses for years 1925 and 1926 include expenses of space occupied by P. E.; and non-operating income for years 1925 and 1926 includes rentals and expenses of rented space. The change in 1927 was made on instructions from the Interstate Commerce Commission.  
 Prepared by Accounting Department, Los Angeles, February 28, 1940.

Wherefore, Defendant in intervention, Pacific Electric Railway Company, prays that the plaintiffs take nothing by their action, and that this action be dismissed.

FRANK KARR,  
C. M. CORNELL,

670 Pacific Electric Building,  
Los Angeles, California,

J. R. BELL,

205 Transportation Building, Washington, D. C.,

Attorneys for Defendant in Intervention,  
Pacific Electric Railway Company.

80 [Duly sworn to by L. A. Lovell; jurat omitted in  
printing.]

82 In the District Court of the United States  
for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Motion for leave to amend complaint*

Filed Dec. 2, 1940

Come now plaintiffs in this action and request leave of Court to amend the complaint herein by striking out paragraph Second of the prayer thereof and by substituting therefor the following paragraph:

Second. That upon final hearing the Court suspend and set aside the aforesaid order of the defendant Interstate Commerce Commission:

FRANK L. MULLHOLLAND,  
Frank L. Mullholland,  
CLARENCE W. MULLHOLLAND,  
Clarence W. Mullholland,  
WILLARD H. McEWEN,  
Willard H. McEwen,  
EDWARD C. KRIZ,  
Edward C. Kriz,

*Counsel for plaintiffs.*

DECEMBER 2, 1940.

No objection to amendment.

S. R. BRITTINGHAM, Jr.

S. R. Brittingham, Jr.,

*Special Assistant to the Attorney General,*

*Counsel for United States.*

E. M. REIDY,

E. M. Reidy,

*Assistant Chief Counsel,*

*Counsel for Interstate Commerce Commission.*



58 UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N

83 In the District Court of the United States for the  
District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Order granting leave to amend complaint*

Filed Dec. 2, 1940

Upon consideration of plaintiffs' Motion for Leave to Amend Complaint in this action, it appearing to the Court that the requested amendment is proper and that it is consented to in writing by the defendants, it is hereby

Ordered, that the complaint herein be amended by striking out paragraph Second of the prayer thereof and by substituting therefor the following paragraph:

Second. That upon final hearing the Court suspend and set aside the aforesaid order of the defendant Interstate Commerce Commission.

D. LAWRENCE GRONER,  
D. Lawrence Groner,

*Chief Justice, United States  
Court of Appeals for the District of Columbia.*

FRED M. VINSON,  
Fred M. Vinson,

*Associate Justice, United States,  
Court of Appeals for the District of Columbia.*

ALFRED A. WHEAT,  
Alfred A. Wheat,

*Chief Justice, United States District  
for District of Columbia.*

DECEMBER 2, 1940.

84 In District Court of the United States for the  
District of Columbia

Civil Action No. 9011

[File endorsement omitted.]

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND BROTHERHOOD OF  
RAILROAD TRAINMEN, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION, DEFENDANTS

(Decided March 6, 1941)

Before GRONER, C. J., VINSON, J., and WHEAT, D. J., sitting as a  
statutory three-judge court

*Opinion*

Filed March 6, 1941

GRONER, C. J.: Pacific Electric Railway Company owns and operates electric railroads and motor bus and truck lines in and near the City of Los Angeles, California. It is a wholly owned subsidiary of Southern Pacific Railroad Company, with the lines of which it connects at numerous points. Southern owns all of its capital stock and a substantial portion of its bonds. The companies are operated separately in both interstate and intra-state commerce. In November 1939 Pacific applied to the Interstate Commerce Commission for a certificate of public convenience and necessity, authorizing it to abandon certain of its lines of railroad in Los Angeles, Orange, and Riverside Counties, California. The application involved approximately 90 miles of trackage. The plan contemplated the abandonment of certain rail lines, the rehabilitation of others, and the substitution of motor bus and motor truck service as a means "of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public." The Commission accepted jurisdiction, and the railway brotherhoods, who are plaintiffs in this action, were permitted to intervene to protect the interests of Pacific's employees. After a hearing in March, 1940, Division 4 issued an order granting Pacific's application in principal part. The Division refused, however, any conditions for the protection of displaced employees, on the ground that the Commission had

no authority to do this under the applicable provisions of the Interstate Commerce Act.<sup>1</sup> \* Reargument before the full Commission, requested by the brotherhoods, was denied; whereupon this action was begun.

Questions of venue are waived, and the jurisdiction of this court is conceded under 28 U. S. C. 41 (28) et seq.

The question is whether the order, to the extent that it denies the requested conditions for want of power to impose them, is erroneous in law. Admittedly, we have power to annul or  
85 suspend an order of the Commission in whole or in part.  
28 U. S. C. § 41 (28). The answer requires—for reasons which follow—a comparison of two sections of the Interstate Commerce Act.

Section 1 (18)<sup>2</sup> forbids a carrier by railroad to acquire new lines or to extend its own lines without obtaining a certificate of public convenience and necessity from the Commission, and likewise forbids a carrier to abandon all or any portion of any line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Section 1 (20)<sup>3</sup> authorizes the Commission to issue the certificate and to attach thereto "such terms and conditions" as in its judgment the public convenience and necessity may require.

Section 5, as amended in 1920, provided for the adoption of a general plan for the consolidation of the country's railroads into a limited number of systems and required, inter alia, the Commission's approval of any consolidation or lease of railroad facilities. Sections 5 (4) (b)<sup>4</sup> authorized the Commission, if it found that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation will be in harmony with and in furtherance of the adopted general plan and "will promote the public interest," to give its approval, "upon the terms" and conditions and with the modifications so found to be just and reasonable". This section was rewritten in 1940<sup>5</sup> and there is no longer any requirement that particular transactions shall be in harmony with any general plan. Only the previous language is pertinent here, however, because of analogies arising out of its interpretation by the Supreme Court in *United States v. Lowden*, 308 U. S. 225.

The important difference in the language used by Congress in the respective sections is that in the abandonment section the Commission was and is authorized to issue the certificate if the public convenience and necessity permit, and to impose such terms and conditions as the public convenience and necessity require.

\*All notes on pages 67-68.

whereas under the consolidation section the certificate issued only if the proposal was in harmony with the general plan of consolidations and would promote the public interest. Upon such a finding, the Commission might apply just and reasonable conditions. In neither section had there been any specific authorization to include in the required terms any provision for compensation to employees affected by the change in structure or operation of the railroad, but the Commission construed the consolidation section as granting such authority and the abandonment section as denying it. Plaintiffs insist that the congressional language does not warrant this difference of construction.

In Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, 321 (a proceeding under the abandonment section), the Commission said:

"It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In Wisconsin Telephone Co. v. Railroad Commission, 162 Wis. 383, 'Public convenience and necessity' was defined as 'A strong or urgent public need.' Public-Convenience Application of Utah Terminal Ry., 72 I. C. C. 89.

"In the present case the conditions sought (provision for payment of wages, etc.) have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad with resulting unemployment.

We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of attempting to insure employment to the personnel of carriers whether or not the affected employees were needed."

Then, referring to its earlier report in St. Paul Bridge and Terminal Railway Co. Control, 199 I. C. C. 588, a proceeding in consolidation, the Commission said:

"The present proceeding differs from that one in that it is brought under the provisions of section 1 (18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in section 5 (4) proceedings we are of the view that under section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from section 5 (4) and read into section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable. Our sympathy for employees and full realization of the hardship that may and often



does result to them in the administration of the abandonment and other provisions of section 1 (18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity."

In the St. Paul Bridge case, the Commission had said the term public interest as used in the consolidation section was broad enough to comprehend every public interest and the interest of every group or element of the public, and accordingly had held it applicable to the welfare of employees. And this view was adhered to and followed in *Associated Railways*, 228 I. C. C. 277, 335-6, in *Louisiana & Arkansas Railway Co.*, 230 I. C. C. 156, 164, in *Chicago Rock Island & Gulf*, 230 I. C. C. 181, 186-7, and again on rehearing, 233 I. C. C. 21. The order in the last mentioned case, to the extent that it imposed the conditions, was set aside by a three-judge District Court. *Lowden v. United States*, 29 F. Supp. 9. On appeal, the Supreme Court reversed. *United States v. Lowden*, 308 U. S. 225. Mr. Justice Stone, who wrote the opinion, upheld the exercise of power, not on the ground, relied on by the Commission, that the term was broad enough to include every public interest, including that of the employees, but on the narrower ground that the welfare of the dismissed employees was a part of the public interest in the adequacy of a public transportation system. Referring to *New York Central Securities Corp. v. United States*, 287 U. S. 12, and to *Texas v. United States*, 292 U. S. 522, where it was held that public interest "is not a mere general reference to public welfare" but "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities," he said the single question is whether:

"the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern."

Then, holding that it had such relation, he said:

"In the light of this record of practical experience and Congressional legislation (in relation to railway labor), we cannot say that the just and reasonable conditions imposed on appeal-  
 37 lees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that

efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve."

The effect of this decision is to approve definitely the attitude of the Commission in consolidation cases and to set at rest any existing doubt of the Commission's discretionary power in such cases, under the then existing provisions of the Act, to impose terms with relation to displaced employees. The analogy to abandonment cases is apparent if the applicable language of Section 1 (20) is considered, equally with that in 5 (4), as intended to apply to and be consistent with the congressional plan for the development and maintenance of an adequate railroad system. And this, we think, is as true as can be. Section 1 (18-20) is not, it should be remembered, confined solely to abandonment cases. It applies as well to extensions of lines, construction of new lines, and the acquisition or operation of "any line of railroad, or extension thereof." In any of these respects it would hardly be contended that the section had no relation to the maintenance of an adequate railway system. Indeed, that it has such relation has been expressly decided by the Supreme Court. For example, in *West Pacif. v. So. Pac.*, 284 U. S. 47, 50, the Court said: "Paragraphs 18 to 22 (of Sec. 1) were considered here in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, and were declared to be a part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities." And see *Texas, etc. R. R. v. Northside Ry.*, 276 U. S. 475, 479, and also *Ches. & Ohio Ry. v. U. S.*, 283 U. S. 35, 42, to the same effect.

While it is quite true these cases dealt with construction of new track and not with abandonment, the statutory test is the same. And from this it follows that the question, in the latter class, is necessarily whether the public interest in an adequate system of railways permits the proposed abandonment. This was recognized in the opinion of Mr. Justice Brandeis in *Colorado v. U. S.*, 271 U. S. 153, 168. There he said "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both." And this brings us, we think, inevitably to the conclusion that the phrase "Public convenience and necessity" was intended to have substantially the same meaning as the phrase "public interest" in § 5 (4); and that the Commission's authority to "attach to the issuance of the certificate (of abandonment) such terms

and conditions as in its judgment the public convenience and necessity may require" likewise embraces as a factor for consideration the displacement of employees with its consequences on efficiency of the transportation system. In this view, the provisions of § 1 (18-20) can only be read in the light of the Supreme Court's interpretation of § 5 (4) (b) in the Lowden case, p. 236, viz:

"The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored."

88 The Commission, however, insists that the case cannot be thus disposed of. After the Lowden decision, it adhered to its original views and declined to apply the analogy we think exists between the two sections. The Commission says it is at least not so clear as to avoid the duty to endeavor to construe the different sections so as to give effect to what the Commission thinks was the plain intention of Congress in the enactment of the respective sections. The argument to this point is that the Commission for five years prior to 1940 had consistently taken the position that it had no authority to impose conditions for the benefit of labor in abandonment cases and called the attention of Congress to its position in this regard, and with this knowledge Congress in the Transportation Act of 1940, in rewriting essential parts of the Act and in conferring added authority on the Commission in various respects, refrained from making any change in Section 1 (18-20). But the rule that reenactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous. *U. S. v. Missouri P. R. Co.*, 278 U. S. 269. "The persuasion that lies behind" that doctrine is merely one factor in a total effort to give fair meaning to language." *F. C. C. v. Columbia Broadcasting System*, 311 U. S. —. For, as was said by the Supreme Court in *United States v. Stewart*, 311 U. S. 60, 69, the interpretation of the meaning of each phrase must be closely related to the time and circumstances of its use. Here the phrases found in the two sections of the Act were written in 1920. As we have pointed out, there is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind either in the case of consolidation or of abandonment the protection

of displaced employees. But in the Lowden case the Supreme Court found in the language of the consolidation section what appeared to it to be a clear implication that Congress, to maintain an adequate and efficient railway system, intended to provide—in the discretion of the Commission—for dismissed employees. And this question being settled, and the phrase used in the abandonment section being, as we think, directed to the same end, it is difficult, if not impossible, to deny it a similar implication. In this view, it may very well be considered that in the amendment of the consolidation section in 1940 and the failure to amend the abandonment section Congress merely intended to make the conditions mandatory in the former and leave them simply discretionary in the latter.

At our request counsel have filed supplemental briefs on the significance of the legislative history of S. 2009, which culminated in the Transportation Act of 1940. It appears that a few comments were made in debate, and some discussion, none too clear, was had in the committee hearings, upon the protection of employees in abandonment cases. Later a bill was introduced to require the Commission in abandonment cases to impose conditions prohibiting the displacement of employees. This bill apparently never came to a vote. These discussions resulted only in the enactment of a provision requiring a "fair and equitable arrangement" to protect employees in consolidation cases and other more specific provisions therefor.\* All the proposals leading to this result similarly dealt with mandatory provisions. We think this legislative history, therefore, can throw little light on the extent of the discretionary authority since 1920 to impose conditions under § 1 (20). Indeed, we think the interpretations so clear that resort to such extraneous matters is unnecessary.

In the Lowden case, it was argued that the effect of the amendment to § 5 as it appeared in the bill then pending in Congress was to create authority to provide for benefits to labor in consolidation cases because none had existed before. But the Supreme Court rejected this idea, saying "Doubts which the Commission at one time entertained but later resolved in favor of its authority to impose the conditions, were followed by the recommendations of the Committee of Six that fair and equitable arrangements for the protection of employees be 'required.'" It

89 was, said the Supreme Court, this recommendation which was embodied in the new legislation, and the Court added "We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Section 5 (4) (b) by making the practice mandatory instead



of discretionary, as it had been under the earlier act." And there is a logical reason for this, for admittedly there were in 1920 as also in 1940 two objects sought through the consolidation section—one, to secure an efficient transportation service; the other, the incidental but inevitable financial benefits to the railroads involved. For the result of consolidation, it was expected, would strengthen their ability to operate and to earn a profit and would relieve them from the financial debilitation under which they had labored for many years. Time has demonstrated the reliability of this belief, and what was in 1920 left discretionary had become in 1940 an acknowledged right. To share with displaced personnel a part of the gain was then and now a necessary factor in the accomplishment of an efficient rail system. In the case of abandonment, the primary object of the statute is the same, namely, the preservation of an efficient transportation service, which it is easily understandable might be defeated by excessive expenditures from the common fund in the local interest, so as to impair the ability of the carrier properly to serve interstate commerce. *Colorado v. U. S.*, supra. at p. 163, 167. But in the case of an abandonment proceeding the second objective—protection of displaced personnel—might be either unfair or impractical and should not, therefore, be mandatory. If the object of the abandonment is to cut off the dead limb of a railway or if it is the total abandonment of a small system, as was true in the case of the Arlington & Fairfax Railway, as to which we had a part,<sup>9</sup> it conceivably might be wholly unreasonable to add to the burden the further loss in requiring financial support of employees no longer needed. But if, on the other hand, the abandonment like consolidation tends to increase the earnings of the corporate applicant by avoiding unnecessary duplication of service or, as in this case, where the abandonment means not a withdrawal of transportation service from a particular area, but the substitution of bus for rail service and the general rearrangement of the properties and operations of the company, as the result of which both stockholders and the public will benefit, it is difficult to recognize any distinction between such a case and one of consolidation, except that the proceedings in the one case are required to be under Section 1 (18-20) and the other under Section 5 (4) (b).

In this view, we are of opinion that it is not permissible to lean too strongly on either the refusal of the Commission for several years to assume the authority which we think it had or the omission of Congress in the recent passage of the Transportation Act to provide it. While it is true the Commission under Section

5 was acting in accordance with a general plan of consolidation which Congress then had in view, it is also true that under Section 1 (20) it acts in accordance with the general policy of that plan, and if that policy includes the protection of employee morale with all its implications in the one case, it seems to us it necessarily must include it equally in the other.

We are, therefore, of opinion that the general rule of interpretation of an ambiguous statute, invoked by the Commission, is not applicable for the reason that, since the decision in the Lowden case, the language of Section 1 (20) is no longer doubtful but is plain, and thus considered with Section 5 (4) (b), harmonizes with the whole Act to the end intended by Congress in its passage. That part of the Commission's report which denies consideration of the employees' petition for lack of power will be set aside, with directions to the Commission to consider the petition and take such action thereon as in the discretion of the Commission is proper.

D. LAWRENCE GRONER, *C. J.*

FRED M. VINSON,

ALFRED A. WHEAT.

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## NOTES

<sup>1</sup> Interstate Commerce Act, § 1 (18-20). 49 U. S. C. § 1 (18-20).

<sup>2</sup> After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. 49 U. S. C. § 1 (18).

<sup>3</sup> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both. 49 U. S. C. § 1 (20).

<sup>4</sup> Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers, and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition

68 UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N

of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable. 41 Stat. 482, 48 Stat. 217.

91 \*Transportation Act of 1940, § 7, — Stat. —

\*The Chicago G. W. Ry. Trackage case was followed subsequently in—Delaware River Ferry Abandonment, 212 I. C. C. 580; Colorado & Southern Abandonment, 217 I. C. C. 366, 381; Pooling of Ore Traffic, 219 I. C. C. 285, 294; Chicago, Rock Island Abandonment, 230 I. C. C. 341, 347; Copper River Abandonment, 233 I. C. C. 109, 113; Gulf, Texas Abandonment, 233 I. C. C. 321, 331; Quincy, Omaha Abandonment, 233 I. C. C. 471, 486; Chicago, Springfield Abandonment, 236 I. C. C. 765, 772; Chicago, Milwaukee Abandonment, — I. C. C. —

\*Chicago, Springfield Abandonment, 236 I. C. C. 765, 772; Chicago, Milwaukee Abandonment, — I. C. C. —

\* § 5 (2) (f) as amended in § 7 of the Transportation Act of 1940, — Stat. —  
\* *Arlington & Fairfax Auto R. Co. v. Capital Transit Co.*, 71 App. D. C. 53, 109 F. 2d 345.

92 In the District Court of the United States  
for the District of Columbia

[File endorsement omitted.]

Civil Action No. 9011

RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA ET AL., DEFENDANTS

*Final order*

Filed April 2, 1941

Upon consideration of the Amended Complaint heretofore filed herein on behalf of the Railway Labor Executives' Association et al., the Answer filed on behalf of defendant, the United States of America, and of defendant, the Interstate Commerce Commission, and the Answer of Defendant in Intervention, the Pacific Electric Railway Company, and the exhibits annexed to said Complaint, Answers, and Answer of Defendant in Intervention, and the matter having been argued by counsel for the respective parties in open Court, it is, by the Court, this 2 day of April, 1941:

Ordered, that such part of the report of the Interstate Commerce Commission, decided August 28th, 1940, in cause Finance Docket No. 12643, "Pacific Railway Company Abandonment" which denies consideration of the employees' petition for lack of power to entertain the same be, and the same is hereby set aside. And it is further

Ordered, that the defendant, the Interstate Commerce Commission, consider said petition and take such action thereon as in

the discretion of said Interstate Commerce Commission, shall be just and proper.

D. LAWRENCE GRONER,  
D. Lawrence Groner,  
FRED M. VINSON,  
Fred M. Vinson,  
ALFRED A. WHEAT,  
Alfred A. Wheat,

*Judges.*

Approved as to form:

E. M. REIDY,

E. M. Reidy,

*Assistant Chief Counsel,*

*Counsel for Interstate Commerce Commission.*

S. R. BRITTINGHAM, JR.,

S. R. Brittingham, Jr.,

*Special Assistant to the Attorney General,*

*Counsel for United States.*

J. R. BELL,

J. R. Bell,

*Counsel for Defendant in Intervention,  
Pacific Electric Railway Company.*

94 In the District Court of the United States  
for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Petition for appeal*

Filed May 20, 1941

The United States of America, the Interstate Commerce Commission, and the Pacific Electric Railway Company, defendants in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of Columbia, entered in said Court on April 2, 1941, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors, accompanying this petition and to which reference is hereby made.

95 Said defendants pray that a transcript of record, proceedings and papers on which said decree was made and



70 UNITED STATES VS. RAILWAY LABOR EXECUTIVES ASS'N

entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated May 19, 1941.

S. R. BRITTINGHAM, Jr.,  
*Special Asst. to Atty. Gen.,*

FRANCIS BIDDLE,  
*Solicitor General,  
For the United States.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*

E. M. REIDY,  
*Assistant Chief Counsel,*

*For Interstate Commerce Commission.*

FRANK KARR,

J. R. BELL,

*For Pacific Electric Railway Company.*

96 In District Court of the United States for the  
District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Assignment of errors*

Filed May 20, 1941

Now come the United States of America, the Interstate Commerce Commission, and the Pacific Electric Railway Company, defendants in the above-entitled cause, by their respective counsel and in connection with their appeal, file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this court entered April 2, 1941.

The District Court erred:

(1) In holding that the Interstate Commerce Commission has authority, in abandonment cases, under the applicable provisions of the Interstate Commerce Act to impose conditions for the protection of displaced employees;

97 (2) In holding that because the Supreme Court of the United States held, in *United States v. Lowden*, 308 U. S. 225, that the Commission had authority to impose conditions for the protection of labor in consolidation cases, it has the same authority under the abandonment provisions of the Act;

(3) In holding that the language used by Congress in the abandonment section (1 (18-20)) is entitled to the same inter-

pretation as was given to the language in the consolidation section by the Supreme Court in *United States v. Lowden*, 308 U. S. 225;

(4) In holding that the legislative history of S. 2009, which culminated in the Transportation Act of 1940, "can throw little light on the extent of the discretionary authority since 1920 to impose conditions under section 1 (20)" and that the interpretation of section 1 (20) is so clear that resort to such extraneous matters is unnecessary;

(5) In failing to give weight to the fact that the Commission has consistently ruled, since the insertion in the Interstate Commerce Act of the provisions of section 1 (18-20) in the Transportation Act of 1920, that it has no authority in abandonment cases to impose conditions for the protection of employees affected by abandonments;

(6) In failing to give weight to the legislative history of the Transportation Act of 1940 showing that the question of affording protection to labor in abandonment cases was called to the attention of Congress, and Congress specifically refrained from giving the Commission such authority;

98 (7) In entering its final decree of April 2, 1941, setting aside that part of the Commission's report denying consideration of the employees' petition for lack of power, and in directing the Commission to consider said petition and take further action thereon, and

(8) In not dismissing the bill of complaint, as amended, at plaintiffs' costs.

Dated May 19, 1941.

FRANCIS BIDDLE,

*Solicitor General,*

S. R. BRITTINGHAM, Jr.,

*Special Asst. to Attorney General,*

*For the United States.*

DANIEL W. KNOWLTON,

*Chief Counsel,*

E. M. REIDY,

*Assistant Chief Counsel,*

*For the Interstate Commerce Commission.*

FRANK KARR,

J. R. BELL,

*For Pacific Electric Ry. Co.*

116 In the District Court of the United States  
For the District of Columbia

[Title omitted.]

*Order allowing appeal*

Filed May 20, 1941

In the above-entitled cause, the United States of America, the Interstate Commerce Commission, and the Pacific Electric Railway Company, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this Court in this cause entered April 2, 1941, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such cases made and provided, it is

117 — Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

Dated May 19, 1941.

D. LAWRENCE GRONER,

*Chief Justice,*

*Court of Appeals for the District of Columbia.*

FRED M. VINSON,

*Associate Justice,*

*Court of Appeals for the District of Columbia.*

ALFRED A. WHEAT,

*Chief Justice,*

*District Court of the United States  
for the District of Columbia.*

120 In the District Court of the United States  
for the District of Columbia

[Title omitted.]

[File endorsement omitted.]

*Notice of appeal*

Filed May 20, 1941

*To the Commissioners of the District of Columbia:*

You are hereby notified that the District Court of the United States for the District of Columbia on May 19, 1941, filed and

entered an order allowing an appeal by the above-named defendants to the Supreme Court of the United States from a decree filed and entered on the 2nd day of April, 1941, in the above-entitled cause, and that the citation signed by such Court on May 19, 1941, in connection with the order allowing such appeal, is made returnable within forty days from the date of the signing of such citation.

121 Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, defendants' assignments of errors, defendants' jurisdictional statement pursuant to Rule 12 of the revised rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

This notice is given to you pursuant to the provisions of the U. S. Code, Title 28, sec. 47a, Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220.

Dated May 19, 1941.

FRANCIS BIDDLE,  
*Solicitor General,*

S. R. BRITTINGHAM, JR.,  
*Special Asst. to Atty. General*  
*For the United States.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*

E. M. REIDY,  
*Assistant Chief Counsel,*  
*For the Interstate Commerce Commission.*

FRANK KARR,

J. R. BELL,

*For Pacific Electric Railway Company.*

122 Service of a copy of the foregoing notice and attachments is hereby acknowledged this 20th day of May, 1941.

*Corporation Counsel, District of Columbia,*

By RICHMOND B. KEECH.

H.

123 [Citation in usual form showing service on Frank L. Mulholland, filed May 20, 1941, omitted in printing.]



128 In the District Court of the United States for the District  
of Columbia

[File endorsement omitted.]

[Title omitted.]

*Praeceptum for Transcript of Record*

Filed May 20, 1941

*To the Clerk of the above-named Court:*

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript the following, to wit:

(1) Bill of complaint and Exhibits A, B, and C thereto, filed November 8, 1940;

(2) Summons served upon the United States of America and the Interstate Commerce Commission, together with acknowledgments of service thereof;

129 (3) Order of Chief Justice, requesting designation of Justices to hear the above-entitled cause dated November 12, 1940;

(4) Order dated November 14, 1940, covering a three-judge court;

(5) Notice from the Clerk of the Court of Appeals for the District of Columbia as to time and place of hearing, dated November 14, 1940;

(6) Answer of United States, filed November 18, 1940;

(7) Answer of Interstate Commerce Commission filed November 25, 1940;

(8) Order of Chief Justice Groner, dated March 15, 1941, permitting intervention of Pacific Electric Railway Company;

(9) Answer of defendant in intervention, Pacific Electric Railway Company, filed November 25, 1940, together with exhibit thereto attached;

(10) Motion of plaintiffs-appellees to amend bill of complaint, and consent thereto, filed December 2, 1940;

(11) Order of court dated December 2, 1940, granting leave to amend bill of complaint;

(12) Amendment to bill of complaint of December 2, 1940;

- (13) Opinion of D. Lawrence Groner, Chief Justice, Court of Appeals for the District of Columbia, decided March 6, 1941;
- (14) Final decree, entered April 2, 1941;
- (15) Defendants' petition for appeal;
- (16) Defendants' assignment of errors and prayer for reversal;
- (17) Defendants' jurisdictional statement under Rule 12 of the Revised Rules of the Supreme Court of the United States;
- 130 (18) Order allowing appeal;
- (19) Notice of appeal and acknowledgment of service;
- (20) Notice to Commissioners of the District of Columbia;
- (21) Citation on appeal;
- (22) Statement of jurisdiction of Supreme Court, together with notice and acknowledgment of service;
- (23) Rules 12 (2), Rules of Supreme Court, statement; and
- (24) Praecipe for transcript of record. Said transcript is to be prepared as required by law and the rules of this Court and by the rules of the Supreme Court of the United States.

Dated May 19, 1941.

FRANCIS BIDDLE,  
*Solicitor General,*  
S. R. BRITTINGHAM, JR.,  
*Special Asst. to Atty. General,*  
*For the United States.*

DANIEL W. KNOWLTON,  
*Chief Counsel,*  
E. M. REIDY,  
*Assistant Chief Counsel,*  
*For the Interstate Commerce Commission.*

FRANK KARR;  
J. R. BELL,  
*For Pacific Electric Railway Company.*

131 Service of the foregoing praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 20 day of May, 1941.

FRANK L. MULHOLLAND  
(Mulholland, Robie & McEwen),  
EDWARD C. KRIZ,  
*Attorneys for Plaintiffs-Appellees.*

132 [Clerk's Certificate to foregoing transcript omitted in printing.]

133 In the Supreme Court of the United States

Statement of points to be relied upon and designation of the  
record to be printed

Filed June 28, 1941

Come now the appellants and say that they will rely on points made in their assignment of errors in brief and oral argument before this Court on their appeal in the above-entitled cause.

Appellants further state that the entire record in this cause as filed in this Court pursuant to praecipe for transcript of record is necessary for consideration of the points set forth above.

FRANCIS BIDDLE,  
*Solicitor General,*

THURMAN ARNOLD,  
*Assistant Attorney General,*

S. R. BRITTINGHAM, JR.  
*Special Assistant to the Attorney General,  
For the United States.*

134

DANIEL W. KNOWLTON,  
*Chief Counsel,*

E. M. REIDY,  
*Assistant Chief Counsel,  
For the Interstate Commerce Commission.*

FRANK KARR,  
J. R. BELL,  
*For the Pacific Electric Railway Company.*

Service of a copy of this "Statement of Points to be Relied upon and Designation of the Record to be Printed" is acknowledged this 27th day of June, 1941.

FRANK L. MULHOLLAND,  
EDWARD C. KRIZ;  
*Railway Labor Executives Association  
and Brotherhood of Railroad Trainmen, Appellees.*

[File endorsement omitted.]

[Endorsement on cover:] File No. 45,551. District of Columbia, D. C. U. S., Term No. 223. The United States of America, Interstate Commerce Commission, and The Pacific Electric Railway Company, Appellants, *vs.* Railway Labor Executives Association and Brotherhood of Railroad Trainmen. Filed June 28, 1941. Term No. 223 O. T. 1941.

FILE COPY

EX-28 1941

CHARLES ELMORE HOSLEY  
CLERK

No. 223

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*In the Supreme Court of the United States*

OCTOBER TERM, 1941

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THE UNITED STATES OF AMERICA, INTERSTATE COM-  
MERCE COMMISSION AND THE PACIFIC ELECTRIC  
RAILWAY COMPANY, APPELLANTS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF TRAINMEN

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF COLUMBIA

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0 STATEMENT AS TO JURISDICTION

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**In the District Court of the United States  
for the District of Columbia**

**Civil Action No. 9011**

**RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN, PLAIN-  
TIFFS**

**v.**

**UNITED STATES OF AMERICA AND INTERSTATE COM-  
MERCE COMMISSION, DEFENDANTS**

**and**

**PACIFIC ELECTRIC RAILWAY COMPANY, INTERVENING  
DEFENDANT**

**Filed May 20, 1941. Charles E. Stewart, Clerk**

**JURISDICTIONAL STATEMENT BY DEFENDANTS UNDER  
RULE 12 OF THE REVISED RULES OF THE SUPREME  
COURT OF THE UNITED STATES**

The defendants-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in the above-entitled cause sought to be reviewed:

**A. Statutory Provisions**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a [Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 41 (28) [Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, section 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219].

U. S. C., Title 28, Section 44 [Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, section 1, 43 Stat. 938].

U. S. C., Title 28, Section 47 [Act of October 22, 1913, c. 32, 38 Stat. 220].

U. S. C., Title 28, Section 345 [Act of March 3, 1891, c. 517, section 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, section 35, 31 Stat. 85; April 30, 1900, c. 339, section 86, 31 Stat. 158; March 3, 1909, c. 269, section 1, 35 Stat. 838; March 3, 1911, c. 231, sections 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, section 2, 38 Stat. 804; February 13, 1925, c. 229, section 1, 43 Stat. 938].

**B. The statute of a State, or the statutes or treaty of the United States, the validity of which is involved**

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

**C. Date of the judgment or decree sought to be reviewed and the date upon which the application for appeal was presented**

The decree sought to be reviewed was entered on April 2, 1941. The petition for appeal was presented and allowed on May 19, 1941, together with an assignment of errors.

**D. Nature of case and of rulings below**

This is an appeal from a decree of the District Court of the United States for the District of Columbia, entered April 2, 1941, setting aside such part of the report of the Interstate Commerce Commission, dated August 28, 1940, in Finance Docket No. 12643, *Pacific Electric Ry. Co. Abandonment*, 242 I. C. C. 9, which denied consideration of the employees' petition to impose conditions for the benefit of labor for lack of power to entertain the same, and directing the Interstate Commerce Commission to consider said petition. The complaint was filed in said court on November 8, 1940, under and pursuant to the provisions of Section 41 (28), and Sections 43 to 48, inclusive, of Title 28 U. S. C.

Said complaint prayed that the court find erroneous the Commission's holding that it had no authority in an abandonment case to impose conditions suggested by plaintiffs-appellees, and that

the court "remand the proceedings to the Commission with instructions that it shall consider the interests of the employees involved in the case as a phase of the public convenience and necessity, and that it has full power and authority to attach such conditions to its order as it in its discretion finds necessary to the protection of the employees involved."

The court was asked to wholly suspend the operation of the order of the defendant Interstate Commerce Commission "during the pendency of this action, and upon hearing to set aside and annul said order." The case was heard on final hearing on November 25, 1940, before a court of three judges organized pursuant to the provisions of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220). The evidence introduced before the Interstate Commerce Commission was not proffered or received in evidence before such court; the fundamental question presented was whether under the provisions of section 1 (18-20) of the Interstate Commerce Act, the Commission has authority to impose conditions for the protection of labor affected, or displaced by the Commission's action in authorizing a railroad company, after full hearing to abandon a portion of its line of railroad. Thereafter, on March 6, 1941, said court rendered its opinion holding that the prayer of the petition

should be granted, and, on April 2, 1941, said court entered the decree sought to be reviewed.

The Pacific Electric Railway Company is a common carrier by railroad engaged in the transportation of passengers and property in both interstate and intrastate commerce and is located wholly within the State of California. All of its capital stock and a substantial portion of its bonds are owned by the Southern Pacific Company, but the operations of each company are conducted separately. The Commission's decision heretofore referred to permitted applicant to abandon certain lines or portions of its line of railroad in Los Angeles, Orange, and Riverside Counties, Calif., and also permitted applicant to abandon operation under trackage rights by that carrier over the line of the Union-Pacific Railroad Company in Riverside and San Bernardino Counties, Calif. No question is raised as to the adequacy of the hearings upon which the Commission's report and order were based. Protests against the abandonment were filed by the Brotherhood of Railroad Trainmen and others, and the Commission concluded (242 I. C. C. at page 24) that the "imposition of conditions for the protection of employees in abandonment proceedings is outside of the scope of its authority." The correctness of this holding is the important question in this case.



The question presented by this appeal is a substantial one. There are several other proceedings pending before the Commission involving the same question as presented by this appeal, and these other cases are being held in abeyance by the Commission pending the court's action herein.

**E. Cases sustaining the Supreme Court's jurisdiction of the appeal**

*United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

*United States v. Baltimore & Ohio Railroad Company*, 293 U. S. 454;

*Florida v. United States*, 282 U. S. 194;

*Beaumont, Sour Lake & Western Railway Company v. United States*, 282 U. S. 74;

*Ann Arbor Railroad Company v. United States*, 281 U. S. 658;

*Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 1;

*Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541;

*United States v. Lowden*, 308 U. S. 225, and

*Hudson & Manhattan R. Co. v. United States*,  
— U. S. —, decided April 28, 1941.

**F. Decree and opinion of the District Court**

Appended to this statement is a copy of the opinion of the District Court and a copy of the decree of said Court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated May 19, 1941.

Respectfully submitted.

✓ S. R. BRITTINGHAM, Jr.,  
*Special Assistant to Attorney General.*

✓ FRANCIS BIDDLE,  
*Solicitor General,  
For the United States.*

✓ DANIEL W. KNOWLTON,  
*Chief Counsel.*

✓ E. M. REIDY,  
*Assistant Chief Counsel,  
For the Interstate Commerce Commission.*

✓ FRANK KARR,

✓ J. R. BELL,

*For Pacific Electric Railway Company.*

Service of the foregoing statement by defendants-appellants directing attention to Paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, and of the documents attached thereto, and receipt of a copy of said statement and of copies of documents attached thereto are hereby acknowledged and accepted this 20 day of May 1941.

FRANK I. MULHOLLAND

(Mulholland, Robie & McEwen),

EDWARD C. KRIZ,

*For Railway Labor Executives Association and Brotherhood of Railroad Trainmen, Plaintiffs-Appellees.*

**In the District Court of the United States  
for the District of Columbia**

Civil Action No. 9011

**RAILWAY LABOR EXECUTIVES' ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN, PLAINTIFFS**

*v.*

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS**

Filed May 20, 1941. Charles E. Stewart, Clerk

(Decided March 6, 1941)

Before GRONER, C. J., VINSON, J., and WHEAT, D. J., sitting as a statutory three-judge court

GRONER, C. J.: Pacific Electric Railway Company owns and operates electric railroads and motor bus and truck lines in and near the City of Los Angeles, California. It is a wholly owned subsidiary of Southern Pacific Railroad Company, with the lines of which it connects at numerous points. Southern owns all of its capital stock and a substantial portion of its bonds. The companies are operated separately in both interstate and intrastate commerce. In November 1939 Pacific applied to the Interstate Commerce Commission for a certificate of public convenience and necessity, authorizing it to abandon certain of its lines of railroad in Los Angeles, Orange, and Riverside

Counties, California. The application involved approximately 90 miles of trackage. The plan contemplated the abandonment of certain rail lines, the rehabilitation of others, and the substitution of motor bus and motor truck service as a means "of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public." The Commission accepted jurisdiction, and the railway brotherhoods, who are plaintiffs in this action, were permitted to intervene to protect the interests of Pacific's employees. After a hearing in March 1940, Division 4 issued an order granting Pacific's application in principal part. The Division refused, however, any conditions for the protection of displaced employees, on the ground that the Commission had no authority to do this under the applicable provisions of the Interstate Commerce Act.<sup>1</sup> Reargument before the full Commission, requested by the brotherhoods, was denied; whereupon this action was begun.

Questions of venue are waived, and the jurisdiction of this court is conceded under 28 U. S. C. 41 (28), et seq.

The question is whether the order, to the extent that it denies the requested conditions for want of power to impose them, is erroneous in law. Admittedly, we have power to annul or suspend an order of the Commission in whole or in part. 28 U. S. C. § 41 (28). The answer requires—for reasons which follow—a comparison of two sections of the Interstate Commerce Act.

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<sup>1</sup> Interstate Commerce Act, § 1 (18-20), 49 U. S. C. § 1 (18-20).

Section 1 (18)<sup>2</sup> forbids a carrier by railroad to acquire new lines or to extend its own lines without obtaining a certificate of public convenience and necessity from the Commission, and likewise forbids a carrier to abandon all or any portion of any line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future *public convenience and necessity* permit of such abandonment. Section 1 (20)<sup>3</sup> authorizes the

<sup>2</sup> After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. 49 U. S. C. § 1 (18).

<sup>3</sup> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate



Commission to issue the certificate and to attach thereto "such terms and conditions" as in its judgment the *public convenience and necessity may require.*

Section 5, as amended in 1920, provided for the adoption of a general plan for the consolidation of the country's railroads into a limited number of systems and required, inter alia, the Commission's approval of any consolidation or lease of railroad facilities. Section 5 (4) (b) 'authorized the Com-

and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both. 49 U. S. C. § 1 (20).

\* Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefore shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers, and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consoli-

mission, if it found that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation will be in harmony with and in furtherance of the adopted general plan and "*will promote the public interest,*" to give its approval, "upon the terms and conditions and with the modifications so found to be just and reasonable" [italics supplied]. This section was rewritten in 1940<sup>5</sup> and there is no longer any requirement that particular transactions shall be in harmony with any general plan. Only the previous language is pertinent here, however, because of analogies arising out of its interpretation by the Supreme Court in *United States v. Lowden*, 308 U. S. 225.

The important difference in the language used by Congress in the respective sections is that in the abandonment section the Commission was and is authorized to issue the certificate if the public convenience and necessity *permit*, and to impose such terms and conditions as the public convenience and necessity *require*, whereas under the consolidation section the certificate issued only if the proposal was in harmony with the general plan of consolidations and would promote the public interest. Upon such a finding, the Commission might apply *just and reasonable conditions*. In neither section had

✓ dation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable. 41 Stat. 482, 48 Stat. 217.

<sup>5</sup> Transportation Act of 1940, § 7, — Stat. —.

there been any specific authorization to include in the required terms any provision for compensation to employees affected by the change in structure or operation of the railroad, but the Commission construed the *consolidation* section as granting such authority and the *abandonment* section as denying it. Plaintiffs insist that the congressional language does not warrant this difference of construction.

In *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315, 321 (a proceeding under the abandonment section), the Commission said:

It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In *Wisconsin Telephone Co. v. Railroad Commission*, 162 Wis. 383, "Public convenience and necessity" was defined as "A strong or urgent public need." *Public-Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89.

In the present case the conditions sought (provisions for payment of wages, etc.) have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad with resulting unemployment. We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of attempting to insure employment to the personnel of carriers whether or not the affected employees were needed.

Then, referring to its earlier report in St. Paul Bridge and Terminal Railway Co. Control, 199 I. C. C. 588, a proceeding in consolidation, the Commission said:

The present proceeding differs from that one in that it is brought under the provisions of section 1 (18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in section 5 (4) proceedings we are of the view that under section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from section 5 (4) and read into section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable. Our sympathy for employees and full realization of the hardship that may and often does result to them in the administration of the abandonment and other provisions of section 1 (18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity.

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• The Chicago G. W. Ry. Trackage case was followed subsequently in—

Delaware River Ferry Abandonment, 212 I. C. C. 580.

Colorado & Southern Abandonment, 217 I. C. C. 366, 381.

Pooling of Ore Traffic, 219 I. C. C. 285, 294.

Chicago, Rock Island Abandonment, 230 I. C. C. 341, 347.

Copper River Abandonment, 233 I. C. C. 109, 113.

Gulf, Texas Abandonment, 233 I. C. C. 321, 331.

Quincy, Omaha Abandonment, 233 I. C. C. 471, 486.

Chicago, Springfield Abandonment, 236 I. C. C. 765, 772.

• Chicago, Milwaukee Abandonment, — I. C. C. —.

In the St. Paul Bridge case, the Commission had said the term *public interest* as used in the consolidation section was broad enough to comprehend every public interest and the interest of every group or element of the public, and accordingly had held it applicable to the welfare of employees. And this view was adhered to and followed in *Associated Railways*, 228 I. C. C. 277, 335-6, in *Louisiana & Arkansas Railway Co.*, 230 I. C. C. 156, 164, in *Chicago Rock Island & Gulf*, 230 I. C. C. 181, 186-7, and again on rehearing, 233 I. C. C. 21. The order in the last mentioned case, to the extent that it imposed the conditions, was set aside by a three-judge District Court. *Lowden v. United States* 29 F. Supp. 9. On appeal, the Supreme Court reversed. *United States v. Lowden*, 308 U. S. 225. Mr. Justice Stone, who wrote the opinion, upheld the exercise of power, not on the ground, relied on by the Commission, that the term was broad enough to include every public interest, including that of the employees, but on the narrower ground that the welfare of the dismissed employees was a part of the public interest in the adequacy of a public transportation system. Referring to *New York Central Securities Corp. v. United States*, 287 U. S. 12, and to *Texas v. United States*, 292 U. S. 522, where it was held that public interest "is not a mere general reference to public welfare" but "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities," he said the single question is whether: the granting or withholding of the protection afforded to the employees by the pre-



scribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern.

Then, holding that it had such relation, he said:

In the light of this record of practical experience and Congressional legislation (in relation to railway labor), we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve.

The effect of this decision is to approve definitely the attitude of the Commission in consolidation cases and to set at rest any existing doubt of the Commission's discretionary power in such cases, under the then existing provisions of the Act, to impose terms with relation to displaced employees. The analogy to abandonment cases is apparent if the applicable language of Section 1 (20) is considered, equally with that in 5 (4), as intended to apply to and be consistent with the congressional plan for the development and maintenance of an adequate railroad system. And this, we think, is as true as can be. Section 1 (18-20) is not, it should be remembered, confined solely to abandonment cases. It applies as well

to extensions of lines, construction of new lines, and the acquisition or operation of "any line of railroad, or extension thereof." In any of these respects it would hardly be contended that the section had no relation to the maintenance of an adequate railway system. Indeed, that it has such relation has been expressly decided by the Supreme Court. For example, in *West Pacif. v. So. Pac.*, 284 U. S. 47, 50, the Court said: "Paragraphs 18 to 22 (of Sec. 1) were considered here in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, and were declared to be a part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities." And see *Texas, etc., R. R. v. Northside Ry.*, 276 U. S. 475, 479, and also *Ches. & Ohio Ry. v. U. S.*, 283 U. S. 35, 42, to the same effect.

While it is quite true these cases dealt with construction of new track and not with abandonment, the statutory test is the same. And from this it follows that the question, in the latter class, is necessarily whether the public interest in an adequate system of railways permits the proposed abandonment. This was recognized in the opinion of Mr. Justice Brandeis in *Colorado v. U. S.*, 271 U. S. 153, 168. There, he said "The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both." And this brings us, we think, inevi-

tably to the conclusion that the phrase "Public convenience and necessity" was intended to have substantially the same meaning as the phrase "public interest" in § 5 (4), and that the Commission's authority to "attach to the issuance of the certificate (of abandonment) such terms and conditions as in its judgment the public convenience and necessity may require" likewise embraces as a factor for consideration the displacement of employees with its consequences on efficiency of the transportation system. In this view, the provisions of § 1 (18-20) can only be read in the light of the Supreme Court's interpretation of § 5 (4) (b) in the *Lowden* case, p. 235, viz:

The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, but that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

The Commission, however, insists that the case cannot be thus disposed of. After the *Lowden* decision, it adhered to its original views and declined to apply the analogy we think exists between the two sections." The Commission says it is at least not so clear as to avoid the duty to endeavor to construe the different sections so as to give effect to what the Commission thinks was the plain intention of Congress in the enactment of the respective

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<sup>1</sup> Chicago, Springfield Abandonment, 236 I. C. C. 765, 772; Chicago, Milwaukee Abandonment, — I. C. C. —.

sections. The argument to this point is that the Commission for five years prior to 1940 had consistently taken the position that it had no authority to impose conditions for the benefit of labor in abandonment cases and called the attention of Congress to its position in this regard, and with this knowledge Congress in the Transportation Act of 1940, in rewriting essential parts of the Act and in conferring added authority on the Commission in various respects, refrained from making any change in Section 1 (18-20). But the rule that reenactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous. *U. S. v. Missouri P. R. Co.*, 278 U. S. 269. "The persuasion that lies behind that doctrine is merely one factor in a total effort to give fair meaning to language." *F. C. C. v. Columbia Broadcasting System*, 311 U. S. —. For, as was said by the Supreme Court in *United States v. Stewart*, 311 U. S. 60, 69, the interpretation of the meaning of each phrase must be closely related to the time and circumstances of its use. Here the phrases found in the two sections of the Act were written in 1920. As we have pointed out, there is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind either in the case of consolidation or of abandonment the protection of displaced employees. But in the *Lowden* case the Supreme Court found in the language of the consolidation section what appeared to it to be a clear implication that Congress, to maintain an adequate and efficient railway system, intended to provide—

in the discretion of the Commission—for dismissed employees. And this question being settled, and the phrase used in the abandonment section being, as we think, directed to the same end, it is difficult, if not impossible, to deny it a similar implication. In this view, it may very well be considered that in the amendment of the consolidation section in 1940 and the failure to amend the abandonment section Congress merely intended to make the conditions mandatory in the former and leave them simply discretionary in the latter.

At our request counsel have filed supplemental briefs on the significance of the legislative history of S. 2009, which culminated in the Transportation Act of 1940. It appears that a few comments were made in debate, and some discussion, none too clear, was had in the committee hearings, upon the protection of employees in abandonment cases. Later a bill was introduced to require the Commission in abandonment cases to impose conditions prohibiting the displacement of employees. This bill apparently never came to a vote. These discussions resulted only in the enactment of a provision *requiring* a "fair and equitable arrangement" to protect employees in consolidation cases and other more specific provisions therefor.\* All the proposals leading to this result similarly dealt with mandatory provisions. We think this legislative history, therefore, can throw little light on the extent of the discretionary authority since 1920 to impose conditions under § 1 (20). Indeed, we

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\* § 5 (2) (f) as amended in § 7 of the Transportation Act of 1940, — Stat. —.



think the interpretation so clear that resort to such extraneous matters is unnecessary.

In the *Lowden* case, it was argued that the effect of the amendment to § 5 as it appeared in the bill then pending in Congress was to create authority to provide for benefits to labor in consolidation cases because none had existed before. But the Supreme Court rejected this idea, saying "Doubts which the Commission at one time entertained but later resolved in favor of its authority to impose the conditions, were followed by the recommendations of the Committee of Six that fair and equitable arrangements for the protection of employees be 'required'." It was, said the Supreme Court, this recommendation which was embodied in the new legislation, and the Court added "We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Section 5 (4) (b) by making the practice mandatory instead of discretionary, as it had been under the earlier act." And there is a logical reason for this, for admittedly there were in 1920 as also in 1940 two objects sought through the consolidation section—one, to secure an efficient transportation service; the other, the incidental but inevitable financial benefits to the railroads involved. For the result of consolidation, it was expected, would strengthen their ability to operate and to earn a profit and would relieve them from the financial debilitation under which they had labored for many years. Time has demonstrated the reliability of this belief, and what was in 1920 left discretionary had become in 1940 an acknowledged right. To share with displaced personnel a part

of the gain was then and now a necessary factor in the accomplishment of an efficient rail system. In the case of abandonment, the primary object of the statute is the same, namely, the preservation of an efficient transportation service, which it is easily understandable might be defeated by excessive expenditures from the common fund in the local interest so as to impair the ability of the carrier properly to serve interstate commerce. *Colorado v. U. S.*, *supra*, at p. 163, 167. But in the case of an abandonment proceeding the second objective—protection of displaced personnel—might be either unfair or impractical and should not, therefore, be mandatory. If the object of the abandonment is to cut off the dead limb of a railway or if it is the total abandonment of a small system, as was true in the case of the Arlington & Fairfax Railway, as to which we had a part,<sup>9</sup> it conceivably might be wholly unreasonable to add to the burden the further loss in requiring financial support of employees no longer needed. But if, on the other hand, the abandonment like consolidation tends to increase the earnings of the corporate applicant by avoiding unnecessary duplication of service or, as in this case, where the abandonment means not a withdrawal of transportation service from a particular area, but the substitution of bus for rail service and the general rearrangement of the properties and operations of the company, as the result of which both stockholders and the public will benefit, it is difficult to recognize any distinction between such a case and one of consolidation,

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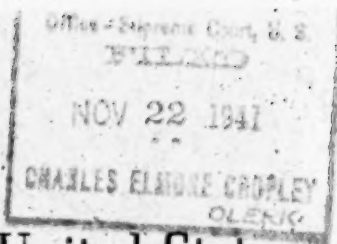
<sup>9</sup> *Arlington & Fairfax Auto R. Co. v. Capital Transit Co.*, 71 App. D. C. 53, 109 F. 2d 345.

except that the proceedings in the one case are required to be under Section 1 (18-20) and the other under Section 5 (4) (b).

In this view, we are of opinion that it is not permissible to lean too strongly on either the refusal of the Commission for several years to assume the authority which we think it had or the omission of Congress in the recent passage of the Transportation Act to provide it. While it is true the Commission under Section 5 was acting in accordance with a general plan of consolidation which Congress then had in view, it is also true that under Section 1 (20) it acts in accordance with the general policy of that plan, and if that policy includes the protection of employee morale with all its implications in the one case, it seems to us it necessarily must include it equally in the other.

We are, therefore, of opinion that the general rule of interpretation of an ambiguous statute, invoked by the Commission, is not applicable for the reason that, since the decision in the *Lowden* case, the language of Section 1 (20) is no longer doubtful but is plain, and thus considered with Section 5 (4) (b), harmonizes with the whole Act to the end intended by Congress in its passage. That part of the Commission's report which denies consideration of the employees' petition for lack of power will be set aside, with directions to the Commission to consider the petition and take such action thereon as in the discretion of the Commission is proper.

FILE COPY



IN THE  
**Supreme Court of the United States**

October Term, 1941.

No. ~~233~~ 223

THE UNITED STATES OF AMERICA, INTERSTATE COM-  
MERCE COMMISSION, and PACIFIC ELECTRIC RAILWAY  
COMPANY,

*Appellants,*

*vs.*

RAILWAY LABOR EXECUTIVES ASSOCIATION and BROTHER-  
HOOD OF RAILROAD TRAINMEN,

*Appellees.*

**BRIEF FOR APPELLANT PACIFIC ELECTRIC  
RAILWAY COMPANY.**

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IN THE  
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October Term, 1941.

No. ~~231~~ 223

THE UNITED STATES OF AMERICA, INTERSTATE COM-  
MERCE COMMISSION, and PACIFIC ELECTRIC RAILWAY  
COMPANY,

*Appellants,*

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RAILWAY LABOR EXECUTIVES ASSOCIATION and BROTHER-  
HOOD OF RAILROAD TRAINMEN,

*Appellees.*

**BRIEF FOR APPELLANT PACIFIC ELECTRIC  
RAILWAY COMPANY.**

**Opinions.**

This is an appeal from an order of the District Court of the United States for the District of Columbia, sitting as a statutory three-judge court. The opinion of the lower court is reported in 38 F. Supp. 818. The opinion of the Interstate Commerce Commission involved herein is reported in 242 I. C. C. 9.

### **Jurisdiction of This Court.**

This Court has jurisdiction of this appeal pursuant to Section 238 of the Judicial Code, Title 28 U. S. C. A., Section 345, the jurisdiction of the lower court being under 28 U. S. C. A., 41 (28) *et seq.* Pursuant to Rule 12, paragraph 1, appellants have filed their statement as to jurisdiction, and this Court has found October 13, 1941, that probable jurisdiction has been shown.

### **Statement of the Case.**

This case presents the question of whether the Interstate Commerce Commission, in permitting a railroad to abandon unprofitable branch lines pursuant to Section 1 (18-20) of the Interstate Commerce Act, can impose conditions for the benefit of railroad labor displaced thereby. There is no attack upon the validity of the Commission's order authorizing the abandonment. Any questions of venue of the lower court have been waived, and the jurisdiction of the lower court is conceded under 28 U. S. C. A. 41 (28) *et seq.*

Appellant Pacific Electric Company filed an application with the Interstate Commerce Commission, docketed as No. 12643 under paragraphs (18) to (20) inclusive of Section 1 of the Interstate Commerce Act, 49 U. S. C. A., Section 1 (18-20), for a certificate of public convenience and necessity authorizing the abandonment of certain rail lines or parts of lines at various locations on its system in Los Angeles, Orange, San Bernardino and Riverside Counties, California [R. p. 3]. Hearings were had in which appellees appeared and at the conclusion of the hearings and the submission of briefs, there was issued a proposed report recommending the granting of the application in part [Exhibit B of the complaint, R. pp. 9-25]. Appellees excepted to this report in so far as it

failed to make provision for employees. On August 28, 1940, Division 4 of the Commission approved the issuance of the certificate permitting abandonment of some of the lines and denied permission to abandon as to others. In the course of its decision, the Commission held it had no authority to impose conditions for the protection of employees in abandonment proceedings. [242 I. C. C. 9 at 24, R. pp. 40-41.]

Following the decision of Division 4 of the Commission, appellees petitioned the entire Commission for rehearing, but this petition was denied [R. p. 6].

Appellees commenced this action in the District Court of the United States for the District of Columbia, No. 9011, on November 8, 1940, by complaint against *United States of America* and *Interstate Commerce Commission* [R. pp. 1-42]. By this action, appellees sought to have the Commission's order set aside in so far as it failed to impose conditions for the protection of employees. On November 9, 1940 the Interstate Commerce Commission extended the effective date of the certificate to November 17, 1940. On November 14, 1940 the Commission, in view of the pending suit to set aside the report and certificate, further amended the certificate to retain jurisdiction of the question of its authority to impose conditions for the protection of employees in abandonment proceedings pending final determination of the pending suit, but provided that in all other respects the report and certificate should be continued in full force and effect.

Answers were filed by defendant, United States of America [November 18, 1940, R. pp. 45-47], defendant, Interstate Commerce Commission [November 25, 1940, R. pp. 48-50], and by defendant in intervention, Pacific Electric Railway Company [November 25, 1940, R. pp.

53-57]. Pacific Electric Railway Company intervened under Title 28, Section 45a of the U. S. C. A. and under the Rules of Civil Procedure for the District Courts of the United States. Upon stipulation of the parties and pursuant to order of the Court, appellees amended the prayer of their complaint as to the relief that was sought [R. p. 57].

At the hearing on November 25, 1940, the Court submitted the case on briefs and on March 6, 1941 announced its decision.

The lower court held that in so far as the report of the Interstate Commerce Commission denies consideration of the employees' petition for lack of power to entertain the same, it should be set aside and ordered that the Commission consider such petition and take such action as in its discretion shall be just and proper [R. pp. 59-68].

The order of the lower court was entered on April 2, 1941 [R. p. 68], and this appeal was taken by defendant, United States of America, defendant, Interstate Commerce Commission, and defendant in intervention, Pacific Electric Railway Company.

### **Specification of Assigned Errors.**

The District Court erred:

(1) In holding that the Interstate Commerce Commission has authority, in abandonment cases, under the applicable provisions of the Interstate Commerce Act to impose conditions for the protection of displaced employees;

(2) In holding that because this Court held, in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208, that the Commission had authority to impose conditions for the protection of labor in consolidation cases, it has

the same authority under the abandonment provisions of the Act;

(3) In holding that the language used by Congress in the abandonment section (1 (18-20)) is entitled to the same interpretation as was given to the language in the consolidation section by this Court in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208;

(4) In holding that the legislative history of S. 2009, which culminated in the Transportation Act of 1940, "can throw little light on the extent of the discretionary authority since 1920 to impose conditions under section 1 (20)" and that the interpretation of section 1 (20) is so clear that resort to such extraneous matters is unnecessary;

(5) In failing to give weight to the fact that the Commission has consistently ruled, since the insertion in the Interstate Commerce Act of the provisions of section 1 (18-20) in the Transportation Act of 1920, that it has no authority in abandonment cases to impose conditions for the protection of employees affected by abandonments;

(6) In failing to give weight to the legislative history of the Transportation Act of 1940 showing that the question of affording protection to labor in abandonment cases was called to the attention of Congress, and Congress specifically refrained from giving the Commission such authority;

(7) In entering its final decree of April 2, 1941, setting aside that part of the Commission's report denying consideration of the employees' petition for lack of power, and in directing the Commission to consider said petition and take further action thereon, and

(8) In not dismissing the bill of complaint, as amended, at plaintiffs' costs.



## SUMMARY OF ARGUMENT.

### I.

**The Interstate Commerce Act Does Not Authorize the Interstate Commerce Commission to Impose Conditions for the Benefit of Employees in Abandonment Cases.**

A. The Act does not confer such authority as shown by the provisions of the Act and by the numerous decisions of the Interstate Commerce Commission.

B. Congress has indicated that it did not intend to confer such authority under the Act,

1. By failing to amend Section 1 (20) after the ruling of the Interstate Commerce Commission had been called to its attention by the Annual Report of the Commission in 1935 and in 1936;

2. By refusing to adopt an amendment introduced for the purpose of changing the interpretation of the Interstate Commerce Commission; and

3. By making a provision for railroad employees generally in the Railroad Unemployment Insurance Act.

## ARGUMENT.

### I.

#### **The Interstate Commerce Act Does Not Authorize the Interstate Commerce Commission to Impose Conditions for the Benefit of Employees in Abandonment Cases.**

##### **A. THE ACT DOES NOT CONFER SUCH AUTHORITY AS SHOWN BY THE PROVISIONS AND PURPOSES OF THE ACT AND BY THE NUMEROUS DECISIONS OF THE INTERSTATE COMMERCE COMMISSION.**

Appellees contend that Section 1 (18) and (20) confers on the Commission the authority to impose conditions for the protection of employees in abandonment cases. (See Appendix for Section 1, (18), (19) and (20).)

The first part of Section 1, subdivision (18), prohibits the extension of a line of railroad, or the construction of a new railroad, or the acquisition or operation of a new line of railroad, or extension thereof, or the engaging in transportation over or by means of such additional extended line of railroad until there has first been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require construction, or operation, or construction and operation, of such additional or extended line of railroad, and then there is added to that subdivision the following:

"\* \* \* no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In subdivision (20) this language is found:

"The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The Commission in the instant case adhered to the interpretation of Section 1 (18-20) of the Act as made for several years past.

For many years, the Interstate Commerce Commission has held that it does not have jurisdiction to make orders as to compensation of employees in abandonment cases.

*Chicago Great Western Railroad Company Trackage* (May 15, 1935), 207 I. C. C. 315;

*Delaware River Ferry Co. of New Jersey Abandonment* (April 17, 1936), 212 I. C. C. 580, 583;

*Colorado & So. Ry. Co. Abandonment* (Oct. 12, 1936), 217 I. C. C. 366, 381;

*Pooling of Ore Traffic in Wisconsin and Michigan* (Nov. 18, 1936), 219 I. C. C. 285, 294;

*Chicago, Rock Island & Pacific Ry. Co. Trustees' Abandonment* (Nov. 22, 1938), 230 I. C. C. 341;

*Copper River & N. W. Ry. Co. Abandonment* (April 21, 1939), 233 I. C. C. 109;

*Gulf, T. & W. Ry. Co. Abandonment* (June 16, 1939), 233 I. C. C. 321, 331;

*Quincy O. & K. C. R. Co. Abandonment and Control* (July 12, 1939), 233 I. C. C. 471, 485-487;

*Chicago, Springfield & St. Louis Receiver Abandonment* (Feb. 12, 1940), 236 I. C. C. 765, 772;

*Tonopah & Tidewater Railroad Company, Ltd. Abandonment* (May 13, 1940), 240 I. C. C. 145, 150;

*Chicago, M., St. P. & P. R. Co. Abandonment* (Aug. 12, 1940), 240 I. C. C. 763, 771.

In *Chicago Great Western Railroad Company Trackage*, 207 I. C. C. 315, it was said on pages 321-322:

"The applicant does not question our power to impose conditions in cases arising under section 1 (18) of the Interstate Commerce Act, but argues that such power is not unlimited and may not be exercised arbitrarily; that in public convenience and necessity cases the standards which we can follow in prescribing conditions are transportation standards and not standards of general welfare; and that unfortunate as the loss of positions by certain railroad employees may be, we are confined in our consideration of this case to the question of convenience and necessity to the public at Kansas City and elsewhere served by the applicant.

"In support of its arguments the applicant cites the decision of the Supreme Court of the United States in *United States v. Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, in which the court held the imposition of a condition under Section 20a of the Interstate Commerce Act relating to the disposition of the funds created under a contract between stockholders and reorganization managers to be beyond our jurisdiction, and a decision of the same court in

*Texas & P. Ry. Co. v. U. S.*, 289 U. S. 627, in which the court, in discussing alleged discrimination under Sections 2, 3 and 4 of that act, said, 'The act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare.'

"Section 1 (20) of the Interstate Commerce Act provides, in part, as follows:

" 'The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.'

"It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In *Wisconsin Telephone Co. v. Railroad Commission*, 162 Wis. 383, 'public convenience and necessity' was defined as 'a strong or urgent public need.' *Public-Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89.

"In the present case the conditions sought have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad, with resulting unemployment. We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of



attempting to insure employment to the personnel of carriers whether or not the affected employees were needed."

The Commission, in the *Chicago Great Western Trackage* case, referred to a decision construing Section 5 of the Interstate Commerce Act, providing for combinations and consolidations of carriers, and continued (207 I. C. C. pp. 322-323):

"\* \* \* The present proceeding differs from that one in that it is brought under the provisions of Section 1 (18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in Section 5 (4) proceedings we are of the view that under Section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from Section 5 (4) and read into Section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable. Our sympathy for employees and full realization of the hardship that may, and often does, result to them in the administration of the abandonment and other provisions of Section 1 (18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity."

The Commission in the *Chicago, Great Western Trackage* case concludes with the following statement (207 I. C. C. p. 323):

"From a consideration of the entire record in this proceeding we are of the opinion that we are without jurisdiction to impose conditions as sought by the

Brotherhood or conditions similar thereto looking to the accomplishment of the same purpose. It follows therefore that the decision of Division 4 herein must be affirmed. An appropriate order will be entered."

*Chicago, Rock Island & Pacific Ry. Co. Trustees Abandonment* (Finance Docket 11888, Nov. 22, 1938), 230 I. C. C. 341, involved the abandonment of a branch line about 67.47 miles in length, and also abandonment of trackage rights in two instances for a distance of 1.41 miles in one case and .16 mile in the other.

It was stated, regarding employees (p. 347):

"Argument on behalf of certain railroad labor organizations is to the effect that certain employees on the branch have no seniority rights on other lines of the applicants' system and that the proposed abandonment would result in their dismissal. However, our power to impose conditions in cases arising under Section 1 (18) of the Interstate Commerce Act does not extend to matters involving the disposition of labor. *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315."

The interpretation by the Interstate Commerce Commission of the abandonment provisions of the Interstate Commerce Act is reasonable and should be given great weight. A similar question was under consideration by this Court recently in the case of *United States of America, Interstate Commerce Commission, et al. v. American Trucking Association, Inc., et al.* (May 27, 1940), 310 U. S. 534, 84 L. Ed. 1345. In that case attempt was made to have the Interstate Commerce Commission exercise jurisdiction over "qualifications and

maximum hours of service of employees" in all branches of motor carrier service, under Section 204(a) of the Motor Carrier Act, whereas the Commission had interpreted the provision to mean that it could make such regulation only as to employees in operative service. The District Court of the United States, for the District of Columbia, had held that the interpretation by the Interstate Commerce Commission was wrong, and that it should proceed to make regulations for all motor carrier employees. This Court reversed the decision, and held that the construction of the Motor Carrier Act by the Interstate Commerce Commission was correct. This Court said (310 U. S. at 545, 84 L. Ed. at 1352):

"It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act 'forty states had regulatory measures relating to the hours of service of employees' and every one 'applied exclusively to drivers or helpers on the vehicles'. In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division, it cannot be said that the word 'employee' as used in §204(a) is so clear as to the workmen it embraces that we would accept its broadest meaning."

This Court said further (310 U. S. at 549, 84 L. Ed. at 1354):

"The Commission and the Wage and Hour Division, as we have said, have both interpreted §204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations

involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

The case of *United States v. Chicago, M., St. P. & P. Co.* (1930), 282 U. S. 311, 75 L. Ed. 359 (cited by the Interstate Commerce Commission in the foregoing case of *Chicago Great Western Trackage*), was to enjoin the portion of an order of the Commission under Section 20a of the Interstate Commerce Act requiring, in accordance with a reorganization plan, the setting aside of a fund which included \$1.50 per share of stock in the old company:

"set aside to provide for the compensation of the reorganization managers and the committees . . . and the fees and disbursements of their counsel and all depositaries and subdepositaries, any balance of said sum to be paid over to the new company as additional working capital or, if the reorganization managers in their discretion shall so determine, to be returned pro rata to the holders of certificates of deposit for stock." (282 U. S. 319, at 320; 75 L. Ed. pp. 361,362.)

The court said (282 U. S. p. 324; 75 L. Ed. p. 364):

"By Subdivision (3) of Section 20a the Commission is empowered to make its grant of authority to issue securities upon such conditions as the Commission may deem necessary or appropriate in the

premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, *Union Bridge Co. v. United States*, 204 U. S. 364, 384, 385, 51 L. Ed. 523, 532, 533) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities."

And further, on the same page:

"In the light of the foregoing, we examine the provision of the reorganization plan in respect of the special fund of \$1.50 per share. That provision embodies a contract between the committees (voluntarily created by private persons), the managers, and such stockholders as shall elect to become depositors under the plan and shall advance, with other moneys for other purposes, the specified sum for the distinct and sole purpose of paying the managers and others for services rendered in behalf of and for the exclusive benefit of these depositors. Neither the old company nor the new one was a party or was privy to this contract. Neither the contract when made nor any of the parties to it, in respect of the contract, was subject to the jurisdiction of the Commission.

The court said (282 U. S. p. 327; 75 L. Ed. p. 365):

"The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law."



And the court concluded (282 U. S. p. 331; 75 L. Ed. pp. 367-368):

"From the foregoing it results that the condition in respect of the special fund of \$1.50 per share was properly set aside and its enforcement enjoined by the court below."

It has been emphasized by this Court in numerous cases that the purpose of the Transportation Act of 1920, which first enacted the construction and abandonment provisions, Section 1 (18-22) was to insure an adequate system of transportation. (*Wisconsin Railroad Commission v. United States*, 257 U. S. 563, 66 L. Ed. 371] *New England Divisions Case*, 261 U. S. 184, 67 L. Ed. 605; *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 70 L. Ed. 578.) As said by this Court in the *New England Divisions Case*, 261 U. S. 184, 189, 67 L. Ed. 605, 609:

"Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, 66 L. Ed. 371, 382, 22 A. L. R. 1086. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new pro-

visions took a wide range.\* Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.\*\* Upon the Commission, new powers were conferred and new duties were imposed.

“The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. \* \* \*

It is in the light of this background that the question in this case must be considered.

The decision of this Court in the case of *Interstate Commerce Commission v. City of Los Angeles*, 280 U. S. 52, 74 L. Ed. 163, is particularly apposite. In that case, as here, the Commission denied its power. It was asked to consider evidence introduced in that proceeding to determine whether the Commission should order the

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\*Among them are the establishment of the Railroad Labor and the Adjustment Boards. Title III, pp. 469-474; see *Pennsylvania R. R. Co. v. United States Railroad Labor Board*, decided this day (261 U. S. 72, 67 L. Ed. 536), the provisions for raising capital, by new Government loans, sec. 210, pp. 468-9, by loans from the Railroad Contingent Fund (the recapture provision), sec. 15a (10, 16), pp. 490, 491; those placing the issue of new securities under the control of the Commission, unaffected by the laws of the several States, sec. 439, pp. 494-496; the provision for consolidation of railways into a limited number of systems, sec. 407, pp. 480-482; provisions for securing adequate car service: *Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 66 L. Ed. 671; for joint use of terminals; for routing; for interchange of traffic between railroads, and between a railroad and water carrier; sec. 402, pp. 476-478; sec. 405, p. 479, secs. 412, 413, p. 483.

\*\*Section 422, pp. 488, 489. To this end, also, the Commission was empowered, among other things, to permit pooling of traffic or earnings, sec. 407, pp. 480, 481; to authorize abandonment of unprofitable and unnecessary lines; sec. 402, p. 477; *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204; to fix minimum, as well as maximum, rates; and thus prevent cut-throat competition and the taking away of traffic from weaker competitors, sec. 418, p. 485; to prevent the depletion of interstate revenues by discriminating intrastate rates, *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 66 L. Ed. 371; *New York v. United States*, 257 U. S. 591, 66 L. Ed. 385; and to determine the division of joint rates.

railroads serving the City of Los Angeles to build and use a new passenger station in that city. The Commission held that it was without authority to require the construction of a new union station (100 I. C. C. 421). By petition for writ of mandamus the correctness of this conclusion was tested in the District Court of the District of Columbia, and ultimately reached this Court, where the sole question was whether the Commission had jurisdiction to order the construction of a new union station. In holding that the Commission was correct in refusing to assume jurisdiction, the court used language which we think is equally applicable here. The court said (280 U. S. 52, 68, 74 L. Ed. 170):

"Without more specific and express legislative direction than is found in the Act we can not reasonably ascribe to Congress a purpose to compel the interstate carriers here to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles. The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. \* \* \* It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. \* \* \*

"\* \* \* A proper statute would seem to require detailed directions and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope. \* \* \*

"To attribute to Congress an intention to authorize the compulsory establishment of union passenger stations the country over, without special mention of them as such, would be most extraordinary. The general ousting from their usual terminal facilities of the great interstate carriers would work a change of title and of ownership in property of a kind that would be most disturbing to the business interests of every state in the country.

"\* \* \* If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. \* \* \*

It is significant that in this case the Court was considering, among other provisions, Sections 1 (18) and (20), which are involved here.

The Commission is a creature of Congress, operating under delegated powers, and its jurisdiction is only that conferred upon it by law.

*Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248, 76 L. Ed. 273.

Its sphere is the regulation of carriers and, within the limits of its delegated powers, the Commission is supreme. The Commission's field is circumscribed by the language of the various acts under which it operates. Despite its great powers and multitudinous duties, it has no authority other than that conferred upon it by Congress. Any

attempt to exercise power in excess of that so delegated is void.

*Interstate Commerce Comm. v. C. N. O. & T. P. Ry. Co.*, 167 U. S. 479, 510, 42 L. Ed. 243, 257;

*Harriman v. Interstate Commerce Comm.*, 211 U. S. 407, 53 L. Ed. 253;

*Southern Pacific Co. v. Interstate Commerce Comm.*, 219 U. S. 433, 55 L. Ed. 283;

*United States v. L. & N. R. R. Co.*, 236 U. S. 318, 59 L. Ed. 598;

*United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 61 L. Ed. 251;

*Interstate Commerce Comm. v. Los Angeles*, 280 U. S. 52, 68, 74 L. Ed. 163, 170.

In *Interstate Comm. Comm. v. Chicago G. W. Ry.*, 209 U. S. 108, 118, 52 L. Ed. 705, 712, this Court said:

"It must be remembered that railroads are the private property of their owners; that while from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. \* \* \*

The Interstate Commerce Commission was created for the purpose of supervising the public use to which the property of carriers is dedicated.

The abandonment provisions of (18) to (20) of Section 1 of the Interstate Commerce Act were enacted to have someone in position to determine whether or not the continuance of a railroad or a part of a line of railroad was justified by the traffic handled thereover, in view of



the fact that such continued operation would constitute a drain on the balance of the system and be operated at the expense of the other users of the system, even though such other users of the system received no benefit whatever from the line sought to be abandoned and thereby be an undue burden upon interstate commerce.

In cases of abandonment, the question is will the continued losses being experienced by the lines sought to be abandoned jeopardize the service then being rendered to the users of the railroad over the balance of its system.

In other words, in abandonment cases the question is will the inconvenience that must necessarily be suffered by the then users of the lines sought to be abandoned overbalance the greater convenience of the general users of the service of the railroad that is to be financially protected by such proposed abandonment.

The provisions (18) to (20) of Section I of the Interstate Commerce Act concerning extensions were enacted to have someone pre-judge and determine whether or not a proposed extension was justified, having the financial position of the carrier in mind. They were put in to stop improvident extensions. They were to prevent undue burdens on interstate commerce.

In cases of extensions of railway, the question is whether the traffic to be served will produce the costs of service or whether such service will be an unreasonable drain upon the balance of the system, and thereby be an undue burden on interstate commerce.

Appellees place great reliance upon the decision of the Supreme Court in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208. In that case the Supreme Court was construing Section 5 (4) of the Interstate Commerce Act,

which contained the following provision (see Appendix for all of Section 5(4)):

"If \* \* \* the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable*, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control \* \* \* will promote the *public interest*, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon the terms and conditions and with the modifications so found to be *just and reasonable*." (Italics supplied.)

It is important to note that in the *Lowden* case the decision of this Court was in accord with the repeated interpretation of the Interstate Commerce Act as made by the Commission. In other words, this Court confirmed the construction arrived at by the Commission, that it had jurisdiction of employee protection under Section 5 (4) of the Act. As long ago as 1935 the Commission, in the *Chicago Great Western* case (207 I. C. C. 315), distinguished between its powers under Section 5 (4) to provide for employees as a part of the *public interest*, and the limitation of its powers as to public convenience and necessity in abandonment proceedings under Section 1 (18-20) of the Act. The Commission's interpretation should be confirmed in the instant case as it was in the *Lowden* case.

The lower court in this case, 38 Fed. Supp. 818, based its decision almost entirely on the *Lowden* case. There are a number of distinguishing features between this case and the *Lowden* case which the lower court failed to recognize. One of these is the difference in the language

used in Section 1 (20) from that used in Section 5 (4)(b). It will be hereafter shown that public convenience and necessity is not a broad enough term to provide for the protection of employees, and the general theory of the *Lowden* case that the purpose of the Transportation Act of 1920 may be carried out by providing for the protection of dismissed employees under the general phase "will promote public interest," does not apply where the phrase "public convenience and necessity may require" is used. A further distinction between the present case and the *Lowden* case which is not recognized by the lower court is the fact that, as stated above, the *Lowden* case merely upheld the decision of the Interstate Commerce Commission, whereas the lower court in this case ruled contrary to the numerous decisions of the Interstate Commerce Commission.

A further ground for distinguishing this case from the *Lowden* case is the fact that in consolidation cases it had been almost universally agreed both between labor and management that it was proper to impose conditions for the protection of dismissed employees.

On this question it was stated in the *Lowden* case, 308 U. S. at 234, 84 L. Ed. at 215:

"As was pointed out by Commissioner Eastman in his concurring opinion in this case the protection afforded to employees by the challenged conditions is substantially that provided in event of consolidation by an agreement entered into in May, 1936, between 219, the great majority, of the railroad lines of the country, and 21 labor organizations. He also directed attention to the fact that the Committee of Six, three of whom were railroad executives, in their report to the President of December 23, 1938, recommended that the federal agency passing upon railroad con-

solidation 'require as a prerequisite to approval a fair and equitable arrangement to protect the interests of . . . employees,' and that this report had been approved by the directors of the Association of American Railroads."

Neither the agreement of May, 1936, nor the recommendations of the Committee of Six referred to in the *Lowden* case above contained anything with regard to the protection of dismissed employees in abandonment proceedings. In fact, this controversial question was expressly not considered.

A further ground for distinguishing this case from the *Lowden* case is the fact that Congress had impliedly adopted the construction of the Interstate Commerce Commission to the effect that it has no authority to impose conditions for the protection of employees under Section 1 (20) as is more fully set forth in "B" of this brief.

The lower court in its opinion dismissed this point by saying that Section 1 (20) was unambiguous and therefore nothing but the language of the statute itself could be considered in interpreting its meaning. The court said (38 Fed. Supp. at page 823):

"Indeed, we think the interpretation so clear that resort to such extraneous matters is unnecessary."

It cannot reasonably be said that the language of Section 1 (20) clearly provides the authority for providing for the protection of employees in abandonment cases in view of the fact that the Interstate Commerce Commission had ruled favorable to the appellants' contentions in numerous contested cases heretofore referred to prior to the decision of the lower court.

As a matter of fact, this Court in the *Lowden* case considered many circumstances outside of the language of the statute itself in reaching its decision, and inferentially indicated that the language of Section 5 (4)(b) was not clear and that such extraneous matters were necessary in order to determine its interpretation. In considering such matters as were considered in the *Lowden* case, the conclusion is almost inescapable that the rulings of the Interstate Commerce Commission on this question under Section 1 (20) should be sustained as they were under Section 5 (4)(b) in the *Lowden* case.

The fundamental policy stated in the Transportation Act of 1920 and referred to in the *Lowden* case which was applicable to consolidations does not apply in abandonment cases. The fundamental purpose of the Transportation Act of 1920 was to provide for consolidations of railroads. That there is a fundamental distinction between consolidations and abandonments is pointed out in the supplemental brief of appellees filed in the lower court where it is stated on page 15:

"Apparently it has been felt by many that a facilitation of consolidations by rail carriers is a policy likely to strengthen the industry. No corresponding idea appears to have been expressed in connection with abandonments. The general question was not considered by either the Committee of Three or the Committee of Six. As far as the protection of employees affected by abandonments is concerned, the Committee of Six had no suggestion to make. The reason is not hard to find. The Washington Job Protection Agreement does not cover cases of abandonment. The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management



and railroad labor. It was one of those questions of 'labor relations' which, as stated by the Committee of Six in its report, found no place in its recommendations."

As stated by the Interstate Commerce Commission and supported by numerous decisions, there is a distinction between *public interest* as used in Section 5 (4), and *public convenience and necessity* as used in Section 1 (18). The fact that the Commission can attach conditions for the protection of labor in one case, while it may not in the other, is entirely logical.

The terms and conditions which the Commission may attach to an order authorizing consolidation, etc. under Section 5(4) of the Act are those which it may find to be "*just and reasonable*" in view of the *public interest*. This gives the Commission very wide latitude in the performance of its delegated powers. It is very different from the restricted powers of the Commission under Section 1 (20) to attach to its certificate "such terms and conditions as in its judgment the *public convenience and necessity* may require."

The term "*public convenience and necessity*" has been in general use in the various states and by the United States for many years as designating the interest of the people who use the public service; who use the transportation service in this case. When this phrase "*public convenience and necessity*" is used, it is plain that this is a limitation upon the authority vested in the Commission. If it were intended that the Commission should have more general authority under various phases of matters of "*public convenience and necessity*," Congress would have said so. It cannot be presumed that the Legislative Body meant something which it did not say.

The Commission had occasion to consider the effect on employment of abandonment, and the relation of the *Lowden* case thereto, in the recent case of *Chicago, Springfield & St. Louis Ry. Co. Receiver, et al., Abandonment*, 236 I. C. C. 765 p. 772, decided February 21, 1940. It is therein stated:

"In the event that the application should be granted, the labor organizations ask that we attach to our certificate a condition requiring that any other railroad taking over any part of the property within one year after operation has ceased shall contribute a definite amount to the benefit of the unemployed Chicago, Springfield & St. Louis workers in the ratio borne by the revenue now produced on the property taken over to the whole revenue of the entire property. We think it obviously improper for such a condition to be imposed upon an unknown purchaser not a party to the proceeding, and that its only effect would be to discourage any purchase of the property for continued operation, so that there would be no benefit to the employees. These protestants also rely on the decision of the Supreme Court of the United States in *United States v. Lowden*, 308 U. S. 225, in urging that the welfare of employees must be considered in abandonment proceedings, but that decision involved different provisions of the statute. As to our lack of power to attach conditions for the protection of employees in abandonment proceedings, we refer to one determination in *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315."

The conclusions thus expressed are sound, and are in accord with the authorities construing "public convenience and necessity" over a long period of time. It is well established that public convenience and necessity refers to the needs of the public served or proposed to be served.

The California Railroad Commission, in the case of *In the Matter of the Application of Santa Clara Valley Auto Line, etc.*, decided in 1917, reported in Volume 14, Opinions and Orders of the Railroad Commission of California, page 112, said, on page 118:

“As has been noted, section 5 of the Act of May 10, 1917, provides in part that no transportation company shall commence operations unless it has first secured from the Railroad Commission a certificate declaring ‘that public convenience and necessity’ require such operation. This is the only test prescribed by the statute. Accordingly, when application is made to the Railroad Commission for an order authorizing automobile stages to operate, the sole test which the Railroad Commission may apply is whether or not the convenience and necessity of the public require that the service as contemplated by petitioner shall be rendered.”

The California Supreme Court said in *Oro Electric Corp. v. Railroad Commission* (1915), 169 Cal. 466, regarding certificate of public convenience and necessity for construction and operation of lines for the transmission and sale of electric current (p. 475):

“The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public.”

In the case of *Chicago, R. I. & P. Ry. Co. v. State, et al.* (Supreme Court of Oklahoma, 1926), 252 Pac. 849, the court said, in reversing the granting of certificate of public convenience and necessity for a bus line (p. 851):

"Public is the opposite of private, and pertains to the people of a nation, state, or community **at large**, the general body indefinitely or as a whole or entirety. In determining whether public convenience and necessity require the operation of a motor carrier, we must consider the question in the light of the demands of the people of the community at large, or as a whole or entirety, in the territory affected by the proposed carrier."

This is followed with a discussion of the facts which show, clearly, that the court has in mind, in determining public convenience and necessity, the persons who use or will use the transportation, concluding with the following statement:

"Some individuals—perhaps a considerable number—would be inconvenienced by the operation of the bus line; but it is clear from the record that, to the great body of the traveling public, it would be neither a convenience nor a necessity, much less 'a convenience and necessity', as contemplated by the act."

In *O'Keefe v. Chicago Rys. Co.* (Dec. 22, 1933), 188 N. E. 815 (Ill.) the court said at page 817:

"The convenience and necessity required to support an order of the commission are those of the public and not of the individual or a number of individuals. *Roy v. Commerce Commission*, 322 Ill. 452, 153 N. E. 648."

It was held in *Department of Public Utilities, et al. v. McConnell, et al.* (Arkansas Supreme Court, June 5, 1939), 198 Ark. 402, 130 S. W. (2d) 9, 30 P. U. R. (N. S.) 53 at 56:

"While it is true that under §43 of Act 324, p. 934, of 1935, the Department of Public Utilities is empowered to 'attach to the exercise of the rights granted by (a certificate of convenience and necessity) such terms and conditions in harmony with (the) act, as in its judgment the public convenience and necessity may require, 'we are of the opinion that such power of limitation relates to methods of construction and the quality and extent of service in relation to rates, etc., rather than to controversies between contending utility companies in respect of matters involving damages to their properties."

The Court said in *Re Dakota Transportation, Inc.* (April 17, 1940, S. D. Supreme Court), ..... S. D. ...., 291 N. W. 589, 35 P. U. R. (N. S.) 442 at 446:

"The convenience and necessity which the law requires to support an order for the establishment or extension of motor vehicle transportation service is the convenience and necessity of the public as distinguished from that of an individual or any number of individuals, and this is the primary matter to be considered in determining what constitutes such public convenience and necessity in a particular case, and the propriety of granting a certificate to that effect." 42 C. J. 687, §121."

In the case of *Village of Mantorville v. Chicago, Great Western R. Co.* (1934), 8 Fed. Supp. 791, the Court was considering the matter of abandonment of a certain line of railroad authorized by the Interstate Commerce



Commission, which was opposed by the Railroad and Warehouse Commission of Minnesota, and by the Village of Mantorville. The Court said on page 794:

"Public convenience and necessity are not determined by a Commission merely to protect the railroad, but to protect interstate commerce from onerous burdens which may affect the efficiency and the ability of the carrier to perform its duty to the public."

It is reasonable to presume that Congress used the words "public convenience and necessity" when enacting Section 1 (18-20) as a part of the Transportation Act of 1920, in contemplation of its commonly understood meaning. Also, the fact that Congress left the wording unchanged during the years since 1920 indicates that it concurred in the interpretation repeated many times by courts and commissions.

As stated in the case of *Essex v. New England Teleg. Co.* (1915), 239 U. S. 313, p. 322, 60 L. Ed. 301, p. 306:

"The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted."

Therefore, the Commission, in its long line of cases, has correctly construed its jurisdiction to be limited, under Section 1 (18), (19) and (20), to determining the public convenience and necessity of the public using the railroad service involved, as distinguished from the jurisdiction of the Commission under Section 5 (4) to provide such terms and conditions found to be just and reasonable to promote the public interest.

B. CONGRESS HAS INDICATED THAT IT DID NOT INTEND TO CONFER SUCH AUTHORITY UNDER THE ACT.

It has been shown that the phrase "such terms, and conditions as in its judgment public convenience, and necessity may require" in Section 1 (20) of the Act is for the protection of the public using the railroad as passengers or shippers and does not provide for the protection of employees. Further, it has been shown that the Interstate Commerce Commission in numerous decisions since 1935 has so interpreted this provision and that its interpretation is entitled to great weight.

It will now be shown that Congress has indicated that it did not intend to confer such authority under the Act.

1. By failing to amend Section (20) after the ruling of the Interstate Commerce Commission had been called to its attention by the Annual Report of the Commission in 1935 and in 1936;

2. By refusing to adopt an amendment introduced for the purpose of changing the interpretation of the Interstate Commerce Commission; and

3. By making a provision for railroad employees generally in the Railroad Unemployment Insurance Act.

In such manner Congress has shown that it has accepted and adopted the interpretation of the Interstate Commerce Commission. The law applicable to the construction of a statute in such a situation is summarized in the following cases;

*United States v. American Trucking Associations*,  
310 U. S. 534 at p. 549; 84 L. Ed. 1345 (May  
27, 1940), at page 1354:

"It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation. The first interpretation was made on December 29, 1937, when the Commission stated: . . . until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations. This expression was half a year old when Congress enacted the Fair Labor Standards Act with the exemption of §13(b) (1), 29 U. S. C. A. §213(b) (1). Seemingly the Senate at least was aware of the Commission's investigation of its powers even before its interpretation was announced. Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act."

*Walker v. United States*, 83 Fed. (2d) 103 (March 30, 1936), at page 106:

"The determination of the construction of the meaning of congressional acts is a judicial function. This function and duty is so entirely and purely judicial that it is beyond the power either of the executive" (*Manhattah General Equipment Co. v. Commissioner*, 56 S. Ct. 397, 80 L. Ed. decided February 3, 1936; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 757, 51 S. Ct. 297, 75 L. Ed. 672) or of the Congress (*Levindale Lead & Zinc*

*Min. Co. v. Coleman*, 241 U. S. 432, 439, 36 S. Ct. 644, 60 L. Ed. 1080; *Koshkonong v. Burton*, 104 U. S. 668, 678, 26 L. Ed. 886) to control.

"If the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute, and neither legislative nor executive construction nor both is of any aid or force. *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 757, 51 S. Ct. 297, 75 L. Ed. 672; *Iselin v. United States*, 270 U. S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566. However, if the act is ambiguous (*Massachusetts Mut. Life Ins. Co. v. United States*, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; *Louisville & N. R. Co. v. United States*, 282 U. S. 740, 757, 51 S. Ct. 297, 75 L. Ed. 672; *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 281, 49 S. Ct. 133, 73 L. Ed. 322; *Iselin v. United States*, 270 U. S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566), the courts will, in their search for the proper meaning of the act, give consideration to a later legislative construction (*New York, P. & Norfolk R. Co. v. Peninsula Exchange*, 240 U. S. 34, 39, 36 S. Ct. 230, 60 L. Ed. 511) or to the construction by an executive for administrative or enforcement purposes (*United States v. Hammers*, 221 U. S. 220, 225, 226, 228, 229, 31 S. Ct. 593, 55 L. Ed. 710).

"Instances occur where both the executive department and Congress adopt the same construction. This usually happens where the courts 'presume' a congressional sanction of an executive construction from the situation that Congress repeats the statutory language without substantial change while the executive construction is existent and being applied in the administration of the earlier act. This 'presump-

tion' is based upon the suppositions that the Congress which enacted the later acts knew of the administrative construction and would have clarified the situation as to the later acts had it been dissatisfied with such construction. It is true that most of the decisions recognizing this *presumed* congressional sanction have been dealing with the construction of the later acts, as to which the situation is somewhat different, since those Acts might be regarded as passed in the light of the then existing executive construction, and therefore as having that construction in mind and adopting it as the meaning for the later acts.) However, even that situation does not lessen the natural inferences that by such subsequent action Congress gave its approval to the executive construction of the same language in the earlier act concerning which that construction came into being. *Massachusetts Mut. Life Ins. Co. v. United States*, 288 U. S. 269, 273, 53 S. Ct. 337, 77 L. Ed. 739; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 302, 307, 53 S. Ct. 161, 77 L. Ed. 318; *Burnet v. Thompson Oil & Gas Co.*, 283 U. S. 301, 307, 51 S. Ct. 418, 75 L. Ed. 1049; *Heiner v. Colonial Trust Co.*, 275 U. S. 232, 235, 48 S. Ct. 65, 72 L. Ed. 256; *Provost v. United States*, 269 U. S. 443, 458, 46 S. Ct. 152, 70 L. Ed. 352—being cases involving construction of the earlier act.

"The weight or force which the courts will, in their construction of an act, give to such executive or legislative constructions, has been variously phrased by the Supreme Court. Similarly, there is a variety of expression as to such weight and force where the court conceives the executive construction to be also approved by Congress. In such latter situation, it has been said that the executive construction has the 'force of law' (*Hartley v. Commissioner*, 295 U. S.



216, 220, 55 S. Ct. 756, 758, 79 L. Ed. 1399; *On Mission Portland Cement Co. v. Helvering* 293 U. S. 289, 294, 55 S. Ct. 158, 79 L. Ed. 367); that it 'must be accepted' (*Alaska Steamship Co. v. United States*, 290 U. S. 256, 262, 54 S. Ct. 159, 161, 78 L. Ed. 302); that it 'will not be overturned except for very cogent reasons' (*Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315, 53 S. Ct. 350, 358, 77 L. Ed. 796); that it would be given 'great weight, even if we doubted the correctness of the ruling' (*Costanzo v. Tillinghast*, 287 U. S. 341, 345, 53 S. Ct. 152, 154, 77 L. Ed. 350); that it will not be 'disturbed except for reasons of weight' (*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492, 51 S. Ct. 510, 512, 75 L. Ed. 1183); that 'were the matter less clear' the court 'should be constrained' to follow it (*Poe v. Seaborn*, 282 U. S. 101, 116, 51 S. Ct. 58, 61, 75 L. Ed. 239); that it will be followed 'when not plainly erroneous' (*New York, New Haven and H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 402, 26 S. Ct. 272, 281, 50 L. Ed. 515). When the quotations in the above sentence are considered in connection with the issues and situations in which they were severally used, it would seem that a safe statement of this rule of construction is that, where a statutory provision is ambiguous, and the executive department which must apply and enforce it declares a construction (not in itself ambiguous, *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16, 20, 52 S. Ct. 275, 76 L. Ed. 587) for administrative purposes, and thereafter Congress re-enacts the provision without substantial change, the courts will accept that construction unless it be 'plainly erroneous'."

See generally the Annotation in 73 L. Ed. 322.

1. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Failing to Amend Section 1 (20) After the Ruling of the Interstate Commerce Commission Had Been Called to Its Attention by the Annual Reports of the Commission in 1935 and in 1936.*

The Commission's holding in the *Chicago Great Western* case, 207 I. C. C. 315, was called to the attention of Congress in the Commission's 49th Annual Report for 1935 from which we quote:

**"FINANCIAL LOSSES OF RAILWAY EMPLOYEES.**

"In proceedings under provisions of the interstate commerce act we issue certificates of public convenience and necessity authorizing railway common carriers to abandon existing facilities, or to unify their railway properties or operations. It follows as a consequence of such abandonments or unifications that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. An instance in which such consequence resulted from the use by one carrier of certain facilities of another, jointly with the latter, is given in our report in *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315. In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. This refers particularly to relocation or abandonment of shops. We recommend further statutory provisions to protect employees from undue financial loss as a consequence

of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

The first recommendation made to Congress for additional legislation in the same report reads:

"1. That further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

In its 50th Annual Report for 1936, page 107, the Commission adhered to the recommendations made the prior year. Congress has amended the Interstate Commerce Act in several particulars since the Commission's decision in *Chicago G. W. R. Co. Trackage*, *supra*, decided May 15, 1935, namely on May 23, 1935 (49 Stat. L. 287); July 16, 1935 (49 Stat. L. 481); August 9, 1935 (49 Stat. L. 543); August 12, 1935 (49 Stat. L. 607); April 16, 1936 (49 Stat. L. 1212); July 5, 1937 (50 Stat. L. 475); August 25, 1937 (50 Stat. L. 809); August 26, 1937 (50 Stat. L. 835); June 23, 1938 (52 Stat. L. 1029); June 29, 1938 (52 Stat. L. 1236); September 18, 1940 (54 Stat. L. 898), and also by the Transportation Act of 1940, approved by the President on September 18, 1940. Nowhere in these amendments has Congress seen fit to specifically confer upon the Commission authority to impose conditions for the protection of labor in abandonment cases. Certainly Congress has had ample opportunity to grant this authority, called to its attention by the Commission in 1935 and again in 1936.

2. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Refusing to Adopt an Amendment Introduced for the Purpose of Changing the Interpretation of the Interstate Commerce Commission.*

It will now be our effort to show that in the Transportation Act of 1940, rewriting essential parts of the Interstate Commerce Act and conferring added authority on the Commission, Congress expressly refrained from conferring the authority which the appellees contend the Commission has had since 1920.

As above stated, the Transportation Act, 1940, was approved September 18, 1940, and constituted a practical rewriting of the Interstate Commerce Act. This law had its antecedent in S. 2009, introduced in the Senate by Senator Wheeler in March, 1939.\* No material change was made in the construction and abandonment provisions of the Interstate Commerce Act with respect to the question of power here involved. However, the consolidation and unification provisions, Section 48 of S. 2009, as introduced, contained in subsection 3(d) thereof, the following (with respect to consolidations, mergers, etc.):

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

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\*The legislation is referred to in *United States v. Lowden*, 308 U. S. 225, 84 L. Ed. 208, and in *United States v. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345.

Extensive hearings were held on this bill by the Senate Committee on Interstate Commerce, of which Senator Wheeler was Chairman. During these hearings, Mr. George Harrison, President of the Railway Labor Executives' Association, one of appellees, and many other witnesses appeared and were fully heard. On Monday, April 3, 1939, Mr. Harrison appeared before the Committee, and after defining a co-ordination of carriers as "a physical bringing together of the facilities without the merging of the corporate organizations" (p. 36), said:

"Of course, if co-ordinations may be subsequently written into this bill over the objections of railroad labor, why, we would anticipate that the committee would look with favor upon the same considerations and protections being accorded the interest of labor that might be adversely affected pretty much along the same general approach as we had provided that labor is protected in consolidations when they are made."

And at page 38, the following occurs:

"Senator Reed: Having run into your brotherhoods at different times in my career, I think I understand their approach, which again is an approach of maintaining employment as stable as possible; but if in the working out of this problem it became necessary or desirable to have unification and if the men who were displaced by unification or consolidation were taken care of by a reasonable adjustment, such as you now have with the management, would that not largely take care of the labor situation?"

Mr. Harrison: I think in the main, Senator—  
Senator Reed: Thank you, very much.

Mr. Harrison (continuing).—that it protects labor.



Senator Reed: Thank you, very much. We all want to protect labor. There is no unfriendliness among us. I am one, if you please, who believes there is no answer to this railroad problem except consolidation or, prior to consolidation, a very substantial unification of facilities, so as to reduce the operating expenses and the cost of service down to a point where the railroads can sell more service."

At that time, neither Mr. Harrison nor any one else that we know of had any thought about extending the law to contain provisions to protect labor in abandonment cases. And when the bill passed the Senate on May 25, 1939, this provision, as a part of Section 49 (3)(c), relating to consolidations and unifications, read:

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

When the bill came before the House, it was passed on July 26, 1939, with amendments. The corresponding section of the House Bill, (Section 5 (2)(e)), dealing with consolidations, mergers, etc. provided:

"(e) No consolidation, merger, purchases, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends, shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result in an increase of total fixed charges on funded debt, except upon a specific finding by the Commission that such an increase in a particular case would not be

contrary to public interest. The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected: *Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

This proviso was inserted on the floor of the House and has become known as the Harrington Amendment, after its proponent, Congressman Harrington. On July 29, 1939, the bill was sent to conference to adjust the differences between the House and Senate bills. While in conference, the Interstate Commerce Commission, through its Legislative Committee sent a communication to the Chairman of the House and Senate Committees, expressing the views of the Commission with respect to the provision as it passed the House. These views, printed by the House, stated:

"As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and

efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

The bill was reported by the conferees back to their respective Houses on April 26, 1940, and as so reported, eliminated the Harrington Amendment in its entirety. On May 9, 1940, the House again adopted a motion to recommit, and insisted:

"(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, of any contract, agreement, or combination, mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, *and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned*, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval of authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment:

"Notwithstanding any other provisions of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." (Italics ours.)

Again the bill was considered by the conferees with the revised Harrington Amendment, which it will be noted for the first time referred to the imposition of conditions

in abandonment cases, and the bill as recommitted was given careful consideration in conference. As reported out by the conferees to their respective legislative bodies, the conferees eliminated reference to abandonments and revised the Harrington Amendment to some extent, and then sent it back to the House and Senate. As revised by the conferees on the motion to recommit, the bill read with respect to the Harrington Amendment:

“(f) As a condition of its approval, under this paragraph (2),\* of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

\*Paragraph (2) refers to consolidations, mergers, leases, contracts to operate, etc.; it does not include abandonments.



It will be noted that reference to abandonment was eliminated. Despite vigorous opposition, the bill passed the House as reported by the conferees on August 12, 1940, and was sent to the Senate where the conference report was agreed to on September 9, 1940. The bill was signed by the President on September 18, 1940, and so far as the above paragraph is concerned, is now law.

In the meantime (on April 26, 1940) which was the same day that the Conference Committee first reported to their two Houses and eliminated in its entirety the so-called Harrington Amendment, Congressman Harrington took the significant action of introducing a separate bill in the House, known as H. R. 9563, to protect labor in abandonment and in other cases, the body of which reads:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division or traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting abandonments under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads involved in such transaction, or in the impairment of existing employment rights of said employees."*

No action to our knowledge was taken by the House on this bill.



The following further references to this matter appear in the Daily Congressional Record (pages 3-4): Congressman Van Zandt, on the floor of the House, in speaking of the Harrington Amendment said:

"That amendment will force the railroads to abandon certain lines, and abandonment means the loss of jobs. It causes me to wonder whether some of these gentlemen are speaking as the friends of railroad labor today or whether they are really the enemies of railroad labor." (Daily Congressional Record, July 24, 1939, p. 13714.)

In the Daily Congressional Record, May 9, 1940, p. 8964, Congressman Lea, the Chairman of the House Committee on Interstate and Foreign Commerce said:

"When a railroad is abandoned its tracks are torn up and the investment is largely destroyed, and to apply the same test or requirement as to taking care of labor in abandonments as in cases of consolidation is entirely unwarranted.

"What is the practical thing? What should we do for labor in those cases? Is it not fair to provide for taking care of them for an adjustment period of a reasonable time, but hardly right to take an indefinite responsibility for them for an unlimited time? If that is a good rule for railway employees, why is it not a good rule for the rest of the employees of the country? Can we go home to our farmers and say to a farmer, 'Because you have employed a man for a while without any specific period and you no longer have a job for him, for any reason, you are going to become responsible for supporting him after the reason for his employment has terminated'?"

"Certainly that is about as wild a proposition as this House was ever asked to approve."

And at page 8079 of the same record appears a telegram from the President of the Brotherhood of Railroad Trainmen, in which he states that "we shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations."

In the Daily Congressional Record of August 12, 1940, page 15582, Congressman Harrington from Iowa, the author of the Harrington Amendment inquired of Congressman Halleck, one of the House Conferees, as follows:

"Mr. Harrington. Does it take care of the employees with respect to abandonments?"

Mr. Halleck. I do not understand that it does, but I may say to the gentleman from Iowa that when he first offered his amendment the amendment did not take care of abandonments."

On the floor of the Senate, as reported in the Daily Congressional Record for September 5, 1940, page 17513, the following colloquy between Senator Reed, one of the Senate Conferees, and Senator Mead, is of interest:

"Mr. Reed. At times I have been representative and spokesman for the railroad brotherhoods in Kansas.

"We have modified the original provisions of the bill. We have made provision for railroad labor in the so-called Harrington amendment—that is, the amendment which was called the Harrington amendment—which is satisfactory to all the operating brotherhoods, so far as I know. If there is any objection to it, I am not aware of it.

"Mr. Mead. As I understand, they are practically united in favor of the bill.

"Mr. Reed. Oh, yes."

If any conclusive answer were needed to the proposition that the Commission has no authority to impose conditions to benefit labor in abandonment cases, it appears to have been supplied when the proponent of such a plan introduced a bill to accomplish what he had in mind, which bill did not emerge from committee. And this, too, in the face of the fact that the *Lornden* case, which is the case that appellees contend supports this claim of authority, was decided on December 4, 1939, some four months prior to Congressman Harrington's separate bill for that purpose.

In view of this extensive legislative history of the labor proposals we feel entirely justified in saying that Congress had the question before it of extending the act's provisions so as to protect labor in other than consolidation and unification cases, and declined to give that authority to the Commission.

3. *Congress Has Indicated That It Did Not Intend to Confer Such Authority Under the Act by Making a Provision for Railroad Employees Generally in the Railroad Unemployment Insurance Act.*

Congress has provided for the protection of dismissed railroad employees under the Railroad Unemployment Insurance Act, 45 U. S. C. A., Section 351 *et seq.* (effective June 25, 1938).

In 45 U. S. C. A., Section 363a, it is provided:

"By enactment of this chapter Congress makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, . . . ."

If Congress felt that the provisions of the Unemployment Insurance Act were inadequate in cases of abandonment, it certainly would have made a more explicit provision therefor than is found in Section 1 (20) of the Interstate Commerce Act. This is especially true in view of the fact that Congress has been informed by the Annual Reports of the Interstate Commerce Commission in 1935 and 1936 that Section 1 (20) did not confer upon the Commission authority to make provisions for employees in abandonment cases.

### Conclusion.

There is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind the protection of displaced employees in abandonment cases. It has been shown that the language of the abandonment section (Section 1 (18-20) of the Interstate Commerce Act) is not broad enough to provide for such protection.

Since the enactment of these abandonment provisions in 1920, in numerous cases the Interstate Commerce Commission has held that these provisions do not authorize provisions for the protection of employees in abandonment cases. Congress itself has not seen fit to change this interpretation. In fact when the Interstate Commerce Act was being extensively amended in 1940, the Committee of Six appointed by the President expressly refrained from making any recommendation as to amendments to provide the Commission with such authority. No recommendation was made because this question was such a controversial one between management and labor that the Committee did not want to inject it into the proposed

amendments concerning which there was relative general accord.

It is clear that Congress has not intended to confer on the Interstate Commerce Commission the authority to impose conditions for the protection of employees in abandonment cases.

Therefore, the order of the District Court of the United States for the District of Columbia, sitting as a statutory three-judge court, should be reversed with directions to dismiss the complaint and enter judgment for defendants.

Respectfully submitted,

J. R. BELL,

FRANK KARR,

C. W. CORNELL

*Attorneys for Appellant Pacific Electric Railway  
Company.*



## APPENDIX.

Section 1 (18-20) of the Interstate Commerce Act, provides:

“(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire, or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

“(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission

shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

“(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, act-

ing for or employed by such carrier; who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both."

Section 5(4), prior to September 18, 1940, read:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock."

Now, the corresponding section reads:

"Sec. 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,

or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

“(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines, owned or operated by any other such carrier, and terminals incidental thereto.”

“(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public in-

terest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others:

(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

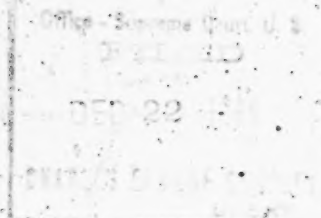
"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.



"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

FILE COPY



No. 223

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**In the Supreme Court of the United States**

October Term, 1941

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INTERSTATE COMMERCE COMMISSION AND THE  
PACIFIC ELECTRIC RAILWAY COMPANY, APPEL-  
LANTS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN, APPEL-  
LEES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLANT, INTERSTATE COMMERCE  
COMMISSION

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# **In the Supreme Court of the United States**

October Term, 1941

No. 223

**INTERSTATE COMMERCE COMMISSION AND THE  
PACIFIC ELECTRIC RAILWAY COMPANY, APPEL-  
LANTS**

*v.*

**RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN, APPEL-  
LEES**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF COLUMBIA**

**BRIEF FOR APPELLANT, INTERSTATE COMMERCE  
COMMISSION**

## **OPINIONS BELOW**

The opinion of the District Court (R. 59) is reported in 38 F. Supp. 818. The report of the Commission (R. 25-42) is published in 242 I. C. C. 9.

## **JURISDICTION**

The final decree of the District Court was entered on April 2, 1941 (R. 68). Petition for appeal

was filed May 20, 1941 (R. 69), and was allowed the same day (R. 72).<sup>1</sup> Probable jurisdiction was noted on October 13, 1941. Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C., sections 45, 47a.

### STATUTES INVOLVED

Pertinent provisions of the statute are set forth in Appendix A, *infra*, pp. 64-75.

### QUESTIONS PRESENTED

Where the Commission finds that to continue operation of portions of a line of railway would impose an undue burden upon the carrier and upon interstate commerce (R. 41) and permits abandonment thereof, does the statute confer upon it, contrary to its uninterrupted and consistent determinations, with which Congress has not seen fit

<sup>1</sup> The statutory defendant, the United States, joined in the appeal (R. 70), but on November 24, 1941, upon the motion of the Solicitor General, its appeal was dismissed. The right of the other appellants to proceed is settled by the decision of this Court in *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14, where the pertinent statutory authority is reviewed (pp. 23-27).

to interfere, authority to impose upon the carrier conditions\* for the protection of labor whose interests may be affected by the abandonment?

Was the lower court right in holding that resort to the legislative history of S. 2009 (Transportation Act, 1940) "is unnecessary" (R. 65) in passing upon this question, contrary to our contention that such history shows Congress had the question before it and declined to confer the authority sought?

A number of cases<sup>3</sup> involving the same question are dependent upon the decision herein.

#### STATEMENT

On November 13, 1939, the Pacific Electric Railway Company, a wholly owned subsidiary of the Southern Pacific Company, but the operations of which are conducted separately (R. 26), applied for permission to abandon lines or parts of lines of railroad aggregating 96.58 miles, all in Los Angeles, Orange, and Riverside Counties, Calif. (R. 25). "This application is the result of

\* The conditions sought appear as Exhibit A to the complaint (R. 7-9).

<sup>3</sup> These cases are: Finance Docket No. 12791, *Southern Pac. Co. et al. Abandonment*; F. D. No. 12792, *Interurban Electric Ry. Co. Abandonment of Operation*; F. D. No. 13239, *Sacramento Northern Ry. Abandonment of Operation*; 247 I. C. C. 157, 158, F. D. No. 12829, *Denver & Rio Grande Western R. Co. Trustees Abandonment*; 247 I. C. C. 381; F. D. No. 12548, *Yazoo & M. V. R. Co. Abandonment*, 244 I. C. C. 163; and F. D. No. 13379, *Roscoe, Snyder & Pac. Ry. Co. Abandonment*, decided November 25, 1941.

a general program of rearrangement of the applicant's passenger service, involving abandonment of certain rail lines and substitution of motor-coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public" (R. 26). The Governor and the Railroad Commission of California were notified, and the State Commission appeared at the hearing (R. 26). Appellees, representing employee members or their organizations, participated in the proceedings. They were "the only protestants showing active opposition to the granting of the application" (R. 38) but "no witnesses appeared in their behalf" (R. 38). Some time after the conclusion of the hearing, an examiner's proposed report was issued, recommending the granting of the application in part (R. 9), and on August 28, 1940, Division 4 approved the abandonment of some segments of the line and dismissed the application as to others (R. 25), finding that "to continue operations of the lines herein permitted to be abandoned would impose an undue burden upon the applicant and upon interstate commerce" (R. 41). The Commission adhered to its many prior decisions that it had no authority to impose conditions for protection of the employees in a case such as this (R. 41).

Following the decision of Division 4, appellees petitioned the entire Commission for rehearing and reconsideration, which was denied (R. 6).

This suit was filed November 8, 1940, attacking as erroneous the Commission's holding that it had no authority in an abandonment case to impose the conditions suggested (R. 5). Apart from this claimed error, no attack is made upon the certificate permitting the abandonment or upon the holding that continued operations of the line would impose an undue burden upon the applicant and upon interstate commerce (R. 41); nor was any question raised concerning the adequacy of the hearing or the sufficiency of the evidence.

After submission on final hearing, on March 6, 1941, the lower court held (R. 59) that section 1 (20) conferred upon the Commission a discretionary authority in abandonment cases to impose conditions for the protection of displaced employees (R. 67). This conclusion was based upon the decision in *United States v. Lowden*, 308 U. S. 225, affirming a Commission order attaching conditions for the protection of labor in consolidation cases, under another section of the act. The lower court further held that the legislative history of S. 2009 (the Transportation Act of 1940), "can throw little light on the extent of the discretionary authority since 1920 to impose condi-

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\*The evidence before the Commission is not before the Court. It is settled by repeated decisions of which *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282, 286, is typical, "that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made."



tions under section 1 (20)" (R. 65) and that the interpretation of that paragraph is "so clear that resort to such extraneous matters is unnecessary" (R. 65). Our contention that this legislative history showed that the question of affording protection to labor in abandonment cases was called to the attention of Congress, and Congress specifically refrained from giving the Commission such authority, was overruled (R. 66). The Commission's consistent rulings that, under the provisions of section 1 (18-20), enacted in 1920 and unmodified, so far as here material, by the 1940 Act, it has no authority in abandonment cases to impose conditions for the protection of employees, were given no weight.

Appellants' assignment of errors attack these holdings (R. 70-71).

### SUMMARY OF ARGUMENT

I. As an agency of the Congress, the Commission is not to construe "public convenience and necessity" as conferring unlimited power. (*Radio Comm. v. Nelson Bros.*, 289 U. S. 266, 285). But it should exhaust all means to determine what authority Congress did or did not confer by the words "such terms and conditions as in its judgment the public convenience and necessity may require." If the legislative history shows, as we think it does, that Congress has not given the Commission power to impose conditions for the benefit of labor in abandonment cases, it is unnecessary to go further.

In the Senate hearings on S. 2009 (Transportation Act of 1940), in response to the statement of a witness that if the Commission is to consider the interests of labor in consolidation cases, "they should consider it where there is an abandonment of facilities," the Chairman of the Committee remarked: "In the interests of labor itself, we cannot go so far as to say to them 'If you are going to abandon a line of a railroad, the Interstate Commerce Commission has got to keep these men working.' " This is a mere excerpt of a very extensive legislative history both in the Senate and in the House, showing that Congress considered the question and declined to confer the sought authority upon the Commission. Whether such Congressional action was desirable or undesirable, wise or ~~unwise~~, is not a matter of concern either to the Commission or to the Court.

II. During the entire period that the abandonment provisions of the Act have been in effect (since 1920), no case can be cited under those provisions wherein the Commission exercised the authority here invoked. Apparently for the first 14 years following the enactment of the Transportation Act of 1920, it was not asked to do so. Its first discussion of the question was in *Chicago Great Western Ry. Co. Trackage*, 207 I. C. C. 315, decided May 14, 1935, and its construction of its powers therein has been consistently followed. The Act has been rewritten in many particulars

since that decision, which had been called to the attention of Congress, without any expression of disapproval of the conclusion. This long-continued administrative construction will not be disturbed except for cogent reasons, which do not exist in this case.

The Commission exercises only those powers which are delegated to it by Congress. It is invested with no roving commission, and if Congress had intended to give to the Commission "unfettered capacity" in a case of this kind it would have done so by plainer language than is contained in the Act.

III. The decision of this Court sustaining the Commission's order in *United States v. Lowden*, 308 U. S. 225, is not controlling. There the Court was construing other provisions of the Act, containing different language, and was affirming an interpretation placed upon indefinite words by the Commission. Referring to (the legislative history of S. 2009 and to a voluntary agreement entered into between most of the rail carriers of the United States and the rail unions, protecting labor in consolidation cases, the court sustained the Commission's action. Here the Court is asked to reach a conclusion different from that of the administrative tribunal, contrary and not in harmony with the legislative history of S. 2009, and beyond the terms of any agreement between management and labor involv-

ing relations with employees. Employees who may be laid off by the railroads because of reduced operations would not be entitled to the protection that employees on abandoned branches would have were the Commission's interpretation upset. Congress has already provided for the protection of dismissed railroad employees under the Railroad Unemployment Insurance Act, effective June 25, 1938, 45 U. S. C. A. section 351 et seq. If further protection is needed, it must be secured either by additional legislation or collective bargaining.

## ARGUMENT

### I

Where Congress has shown by its own action that it has not conferred certain authority upon the Commission, such determination, with the wisdom of which the administrative tribunal has no concern, is governing upon it and upon the courts

Section 1 (18) <sup>a</sup> of the Interstate Commerce Act provides that "no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall first have been obtained from

<sup>a</sup> Set out in its entirety in Appendix A, pp. 65-68, *infra*. Both paragraphs (18) and (20) of section 1 were added by the Transportation Act of 1920, the purpose of which, as this Court has stated on many occasions, was to insure to the people of the United States an adequate system of transportation. *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184, 190; *Texas & Pac. Ry. Co. v. Gulf, C. & S. Fe Ry. Co.*, 270 U. S. 266, 277.

the Commission a certificate that the present or future public convenience and necessity permit of such abandonment," and section 1 (20)<sup>5</sup> authorizes the Commission "to attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." It is this last paragraph of broad general scope which appellees contend confers the authority sought on the Commission. Acting under the provisions of these paragraphs, the Commission between 1920 and October 31, 1941, the date of its last annual report to Congress, granted 1,696 applications to abandon, involving 27,722 miles of road,<sup>6</sup> and in no case has it considered it had authority to impose conditions such as here sought.

It will be obvious that "such terms and conditions as in its [the Commission's] judgment the public convenience and necessity may require" is language so general in nature that some interpretation is necessary. "While one may not end with the words of a disputed statute, one certainly begins there." *Trade Commission v. Bunte Bros.*, 312 U. S. 349. We believe it logical to first discuss the question of Congressional authority conferred upon the Commission, because if we can show that Congress, after considering the matter, declined to confer the sought authority, there is

<sup>5</sup> See footnote on page 9.

<sup>6</sup> The details will be found in Appendix B, p. 75, *infra*.



no need to apply extraneous interpretative principles. We are not unmindful of course of this Court's opinion in the *Lowden Case, supra*, where the Court construed language involving other provisions of the act, and by the application of well-recognized canons of construction, affirmed the Commission's assumption of authority in consolidation cases. We discuss that case later (pp. 56-60).

As stated, the abandonment provisions were added to the Interstate Commerce Act by the Transportation Act of 1920, and our research into the legislative history of that Act confirms the statement of the lower court herein (R. 64-65) that "there is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind either in the case of consolidation or of abandonment the protection of displaced employees."

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Mr. Esch, Wisconsin, Chairman of the House Committee on Interstate and Foreign Commerce, in presenting the Esch-Cummins Bill to the House (which resulted in the Transportation Act of 1920) did say: "There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order of abandonment is issued. We give such control to the Commission to investigate the situation to determine the facts." (Cong. Rec., November 11, 1919, Vol. 58, pp. 8309-8318.)

For some time following the depression beginning in 1929, the condition of the railroads had evoked concern. At the end of 1936 there were 91 roads of all classes in the hands of receivers and trustees, operating 69,712 miles of road, about one-third of the mileage in the country.<sup>8</sup> Early in 1938, the President appointed three members of the Commission, referred to as the Committee of Three, to bring in recommendations "relating to this serious situation,"<sup>9</sup> and these recommendations are set forth in a Message from the President.<sup>10</sup> On September 20, 1938, the President appointed a Committee of Six, equally divided between management and labor,<sup>11</sup> "to consider the transportation problem and recommend legisla-

<sup>8</sup> House Document No. 583, 75th Congress, 3d Session, pp. 33, 48.

<sup>9</sup> House Document No. 583, 75th Congress, 3d Session, p. 1.

<sup>10</sup> House Document No. 583, 75th Congress, 3d Session, pp. 1-3.

<sup>11</sup> The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks and chairman of the Railway Labor Executives Association; Mr. B. M. Jewell, President of the Railway Employees Department of the American Federation of Labor, and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen (Hearings on Transportation Act of 1939, Senate, pp. 4-5).

tion.”<sup>12</sup> Insofar as of significance here was their recommendation with respect to consolidations that there be “protection of the public interest and a fair and equitable arrangement to protect the interest of employees affected.”<sup>13</sup>

*Senate proceedings.*—On March 30, 1939, Senators Wheeler and Truman introduced a bill, known as S. 2009, concerning which Senator Wheeler stated (Cong. Rec., Vol. 84, part. 6, p. 6136, 76th Congress, 1st Session):

We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, \* \* \*

Section 37 of S. 2009 incorporated the abandonment paragraphs of the 1920 act, without change, including authority to attach to the certificate terms and conditions related to public convenience and necessity. This language was not particularized. On the other hand, in section 49 (3) (b) covering unifications, consolidations, etc., it was provided that “In passing upon any proposed transaction under the provisions of this section, the Commission shall give weight to the following considerations, among others, (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect

<sup>12</sup> Report of Committee to the President, dated December 23, 1938, p. 1.

<sup>13</sup> Page 5 of report referred to in footnote 12.

upon the public interest of the inclusion, or failure to include, weak railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." The detail of the matters to be considered in consolidation cases, compared with the general language in the abandonment section, is noteworthy. If Congress proposed to confer the same authority in abandonment cases, it would have used the same language. In the next subparagraph of S. 2009, section 49 (3) (c), it was provided, among other things: "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of *this section*, a fair and equitable arrangement to protect the interests of the employees affected."<sup>12</sup> [Italics added.]

Hearings commenced before the Senate Committee on April 3, 1939, and on that day Mr. Harrison, a representative of labor on the Committee of Six and chairman of the Railway Labor Executives Association, appellee here, testified and stated that if it became necessary or desirable to have unifications or consolidations, with resulting displacement of men, a reasonable adjustment

<sup>12</sup> The similarity of this language with the recommendation of the Committee of Six concerning consolidations will appear from the report of that Committee to the President dated December 23, 1938, page 32.

such as labor now had with management," would "in the main" protect labor. On April 7, 1939, Mr. Tom McGrath, General Counsel of the Brotherhood of Railroad Trainmen, the other appellee, testified before the Committee. (See pp. 387-405 of the Senate Hearings.) At page 401, Senator Wheeler referred to the paragraph of the bill reading:

The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

Concerning which (p. 402) Mr. McGrath said:

I say this particular section 49 should carry with it, as a corollary, an agreement or provision protecting the men against loss of jobs in cases of consolidations and mergers. If they are entitled to that in one case, I think they are entitled to it in another; *and the same thing is true with respect to abandonments.* [Italics added.]

Senator Wheeler responded (p. 402):

The CHAIRMAN. *Except it is the first time*

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<sup>15</sup> This adjustment had reference to the so-called Washington agreement, entered into between 85 percent of the railroads of the United States and 21 labor organizations in 1936 for at least a 5-year period, covering provisions for the protection of labor in unification, consolidation, merger, and pooling cases. The Washington agreement did not apply to abandonments. Its provisions are summarized at page 241, House hearings on H. R. 2531, February 3, 1939. The Washington agreement is printed in its entirety beginning with page 231 of those hearings.



*that your organization or anybody else has ever intimated that there should be written into the law any provision such as you are suggesting at the present time.*

McGrath continued:

When you say that the Commission must of necessity consider the interests of labor, then all I am saying is that if they must consider the interests of labor in consolidations and mergers, they should also consider the interests of labor where there is pooling of traffic. That is the only point. *Also I say if they are going to consider it in that connection, they should consider it where there is an abandonment of facilities. [Italics added.]*

Senator Wheeler's analysis of this proposal found expression in this statement (p. 404):

The CHAIRMAN. Mr. McGrath, let me say to you that this committee has always gone just as far and a lot further than a great many people in this country think it should go; but in the interests of labor, itself, we cannot go so far as to say to them, "If you are going to abandon a line of railroad, the Interstate Commerce Commission has got to keep these men working."

Mr. McGRATH. I do not ask you to say that; but I am not going to quibble with you over that question.

The CHAIRMAN. Candidly, I think what you are suggesting with reference to that is not in the interest of labor. I think it would be very injurious to labor in the long run.

Mr. McGRATH. That is, you mean if we were to insist that these men should be retained?

The CHAIRMAN. If you write in the same provisions, and you have the Washington agreement, that is what it would mean with reference to abandonments.<sup>16</sup>

<sup>16</sup> Just prior to this statement, the following colloquy between Senator Wheeler and Mr. McGrath occurred:

The CHAIRMAN. "But, Mr. McGrath, just stop and ask yourself this question: When a railroad company says to us, 'Here is a piece of track, out here, that is not making any money and there is no traffic on it, and we want to abandon it, because there is no freight to be hauled over it,' then what are we going to say to them? Are we going to say, 'You have to employ those men, whether there is any traffic there or not'?"

"As a matter of fact, suppose the Baltimore & Ohio Railroad's line between here and New York could not get any traffic and could not employ any men: Would you say that we should write into the law a provision which would result in our saying to the Baltimore & Ohio Railroad, under those conditions, 'You have to employ as many men, whether you have any traffic or not; and if you have no traffic, you must abandon it'? How can you do that?"

Mr. McGRATH. "I am not saying you should go that far, Senator."

The CHAIRMAN. "Well, take as an illustration the branch line running from Billings, Mont., up to Red Lodge: There used to be a lot of traffic over that branch; there was coal being shipped, and there was a great deal of traffic. Then the Northern Pacific began to get its coal at another place. Thereafter there was no traffic on the Billings-Red Lodge branch; it was more or less idle; and finally they abandoned it and put on some busses; there was not money enough. Now, if they are going to try to keep that up, when there is no traffic over it, it seems to me they are going to break down their whole labor structure—much more than by laying off a few men. Because if they do not, the whole financial structure of the railroads is going to break down; and if that does

In answer to the question by the Chairman as to what the Commission could require in cases of abandonment McGrath simply replied, "I do not know. They might require the employment of men on other positions with the railroad." McGrath further stated (p. 403):

I am asking—if you put *discretionary* power in the Commission—that you make it broad enough to take care of these conditions, which we think merit consideration by the Commission. You are not imposing any obligation on them. [*Italics added.*]

Senator Wheeler asked with reference to the Washington agreement (p. 404):

Why did you not provide in there the provisions for abandonments and other things that you are asking the committee to do?

The following colloquy took place:

Mr. McGRATH. Now, Mr. Chairman, what about this proposition? Suppose a merger has taken place: there is no disclosure of

happen and the railroads cannot make any money at all, then what is going to happen to labor?

"In other words, you cannot put impossible burdens on railroads and still have them pay wages to labor; that cannot be done."

Mr. McGRATH. "I understand that. However, I say that if the Commission has the power to put on those restrictions with respect to the men, in occasions of consolidation and merger, that would take care of it. I say that if, under this bill, you are going to give them such power, then let them have it with respect to abandonments as well as mergers (pp. 402-403, Senate Hearings on S. 2009)."

proposed abandonment of facilities, in that instance. It may be a freight house or a yard or something of that sort. As soon as it is approved and perfected and the abandonment is made, the men get no consideration, under this law. I believe that is something to consider.

The CHAIRMAN. I do not agree with you. When there is a consolidation, I think they take into consideration exactly what is going to take place and how many men they are going to lay off, and then they come under the Washington agreement.

The hearings before the Senate Committee were concluded on April 14, 1939, and on May 16, 1939, the Committee submitted its report to the Senate, explaining therein the changes made in the unification and consolidation provisions of the bill.<sup>17</sup>

The bill was debated on the floor of the Senate May 22 to May 25, 1939, when it passed by a vote of 59-6. (Cong. Rec., Vol. 84, part 6, p. 6158, May 25, 1939, 76th Cong., 1st Sess.)

Despite the fact that labor problems attended upon abandonments had been thus affirmatively brought to its attention, the Senate, when it passed the bill, saw fit to restrict it to the protection of employees' interests in cases involving consolidations and unifications alone. Section 49 (3) (c) merely read:

The Commission shall require, as a prerequisite to its approval of any proposed

<sup>17</sup> Senate Rep. No. 433, May 16, 1939, 76th Cong., 1st Sess., pp. 28-29.

transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

It appears that the proposition of protecting displaced employees in abandonment cases was squarely before the Senate Committee. The testimony discloses a grave reluctance to give approval to the protection of employees in abandonment proceedings.

Appellees argue the proposition that the objections voiced by the Chairman to McGrath's proposal related solely to the scope of the protection rather than the transaction affected. In view of Senator Wheeler's reference to specific illustrations of the ill effect of such provisions upon railroads in abandonment cases we feel that the appellees' construction is unfounded. It should here be pointed out that the Chairman voiced himself as strongly opposed to even a *discretionary* power in the Commission.

*House proceedings.*—In March 1939, Chairman Lea of the House Committee on Interstate and Foreign Commerce introduced a bill (H. R. 4862) similar to S. 2009, as to the abandonment and consolidation provisions, and also (in January) H. R. 2531.<sup>18</sup> With respect to consolidations,

<sup>18</sup> Entitled a bill to redistribute the functions of the Interstate Commerce Commission with a view to more efficient exercise of rate-making authority; to extend the jurisdiction of the Commission in relation to the fixing of minimum rates,



mergers, leases, etc., H. R. 2531 authorized the Commission to approve the proposed transaction "subject to such terms and conditions and modifications as it shall find to be just and reasonable," and if it "will promote the public interests."<sup>19</sup> The House hearings on the bill were protracted, running from January 24, 1939, to March 30, 1939 (p. 1789 of House Hearings). At these hearings Mr. Gray, one of the Committee of Six, said there was no disagreement whatever about protecting employees displaced by consolidations and mergers (p. 184 of House Hearings, February 1, 1939) and they had "a basis of compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination" (pp. 193-194).

Mr. Harrison, president of the Railway Labor Executives Association, and a member of the Com-

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and rates for inland water transportation; to create a Railroad Reorganization Court; and for other purposes. Printed in Hearings, House of Representatives, January 24, 1939, pp. 1-17.

<sup>19</sup> In determining the public interest the Commission was to give due consideration to the promotion of the efficiency and economy of the carriers' service, the affording of better and cheaper service to the public, the securing of a simplified and more effective regulation of the carriers, the ultimate establishment of a number of strong and efficient systems, the due protection of the interests of the stockholders and creditors, the maintenance of such competition among the carriers as is necessary and reasonable in the protection of the public interest; and to all other relevant matters. (P. 3 of House Hearings.)

mittee of Six, told the House Committee it was in the public interest to protect the rights and interests of the employees who may be adversely affected by mergers (p. 214). He spoke of the provisions of the Washington agreement, then in force three years, and which "has worked out very satisfactorily" (p. 216), and added:

"It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection."<sup>20</sup>

At page 243, he said that the Washington agreement, generally speaking, had been satisfactorily maintained, adding:

"Of course, the employees do not believe it is as liberal as it ought to be. We undertook to get more liberal provisions, but this was as far as we could get the managers to agree \* \* \*. We have settled the question through collective bargaining and if it is not satisfactory, the burden is on us to proceed in the same way to try to change it.

"So, I would not be here urging that you attempt to do anything different than what we are in agreement with our employers on."

In connection with abandonments, Mr. Harrison said:

"The agreement does not cover instances where parts of railroad are abandoned.

<sup>20</sup> Mr. Harrison was here speaking of coordinations or mergers.

We sought to get the protection extended in those cases, but the carriers declined to agree with the organizations to afford protection in instances of abandonments. \* \* \*

Now, I realize I am skating on thin ice and I do not want to be in any position of bad faith with our employers, because we have this agreement and if it is not satisfactory the burden is on us to change it. I would like to have an opportunity to talk that matter out with our employers before I should make any definite request upon the committee in that direction. I think we owe that to them to talk to them about it" (p. 244).

Summarized, this testimony of Mr. Harrison means that the carriers and labor had in good faith entered into the Washington agreement for a period of at least five years to protect labor in consolidation and coordination cases; that he was not asking Congress to go further and deal with abandonments, but that was a matter for negotiation with the railroads.

Mr. L. Alfred Jenny, Railroad Consulting Engineer, New York City, told the House Committee, page 1321:

"The proposed bill does not indicate what, if any, protection is to be given to labor in case of railroad abandonments. \* \* \*"

Commissioner Eastman, in his testimony, inserted in the record a copy of a letter from President Roosevelt to the railroads and labor representatives, dated March 6, 1936, which Mr.

Eastman stated led up to the Washington agreement (1722).<sup>21</sup>

As before referred to, S. 2009 passed the Senate on May 25, 1939. Following the extensive House hearings, on July 18, 1939, the House Committee

<sup>21</sup> Extracts from this letter were—

What disturbs me is the apparent inability of the managements and the men to cooperate in working out such common problems. Issues which ought to be settled by friendly negotiation are being fought out in the battle-grounds of Congress and the courts. Legislation has its place. Often it has been necessary for the welfare of labor or capital or both, but it is a remedy to be taken with great caution or it may prove worse than the disease.

A critical situation prompts this letter. It is common knowledge that there is much waste in railroad operation caused by the great number of railroad companies, and that much of it can be avoided either by consolidations or by greater cooperation and coordinated use of various facilities.

"All this can be avoided if the contending parties will confer with each other in a spirit of reasonableness and moderation. The employees ought not to forget what they will gain if the railroads can progress as transportation agencies and what they will lose if the railroads retrogress. They ought to bear in mind that the principle of protecting employees against undue hardship from economy projects is only beginning to gain ground. It is not yet applied by most industries nor by the other transportation agencies, nor even by the Government. The railroad industry has always taken the lead in the establishment of good working conditions and labor relations, but it cannot safely get too far in advance of the procession. Nor ought the employees to overlook the fact that if unnecessary railroad costs are not avoided much desirable work that creates employment may not be undertaken. This has happened in maintenance work especially, and may easily happen again" (pp. 1721-1722 of House Hearings).

reported its own bill.<sup>22</sup> Instead of codifying the Act, as in the Senate bill, the House bill amended certain existing provisions of law, and added a Part III dealing with water carriers. No change was suggested in section 1 (18-20) applying to abandonments. With respect to section 5, covering consolidations, mergers, etc., the House bill required the Commission, in passing upon any transaction under section 5, to give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) where appropriate, the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) where appropriate, the total fixed charges resulting from the proposed transaction, and (4) where appropriate, the interest of the carrier employees affected. The House bill in subparagraph (e) of paragraph (2), section 5, adopted the provision in the Senate bill that "the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." This bill was debated in the House beginning July 21, 1939, and on July 24, 1939, Mr. Harrington of Iowa suggested an amendment as follows:

<sup>22</sup> Explained in House Report 1217, 76th Cong., 1st Sess., dated July 18, 1939.



*"Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."*<sup>23</sup>

At page 9883 (Cong. Rec. Vol. 84, part 9, 76th Cong., 1st Sess.), Mr. Harrington explained his amendment as protecting "the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations." The bill passed the House on July 26, 1939 (Cong.

<sup>23</sup> The full paragraph with the Harrington amendment added reads as follows:

"(e) No consolidation, merger, purchase, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends, shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result in an increase of total fixed charges on funded debt, except upon a specific finding by the Commission that such an increase in a particular case would not be contrary to public interest. The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected. *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*" [Italics added.]

(Cong. Rec. Vol. 84, part 9, pp. 9881-9882, July 24, 1939, 76th Cong., 1st Sess.)

Rec. Vol. 84, part 9, p. 10127, 76th Cong., 1st Sess.), containing the Harrington amendment and other changes in the Senate bill. On July 29, 1939, the bills were sent to conference.

*Proceedings on recommitment.*—While the bills were in conference, the Legislative Committee of the Interstate Commerce Commission submitted a report on the bills (House Committee Print, 76th Cong., 3d Sess.) in which it criticised the Harrington amendment.<sup>24</sup>

On February 8, 1940, there is a discussion in the House (Cong. Rec., Vol. 86, Part 2, 76th Cong., 3d Sess., pp. 1260-1264) of the savings to the carriers in consolidation cases, how labor would be affected and why the Harrington amendment was necessary to protect labor in consolidation cases.

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<sup>24</sup> This report (January 29, 1940) stated (p. 67):

"As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

The effect of abandonments was only incidentally discussed.<sup>25</sup>

On April 26, 1940, in House Report No. 2016, 76th Cong., 3d Sess., the Conference Committee report was submitted. No changes were suggested in the abandonment provisions of existing law, and all changes made by the Senate and House bills in section 5, dealing with consolidations, were deleted, reverting to existing law.<sup>26</sup>

<sup>25</sup> Chairman Lea was asked if he would accept the Harrington Amendment, and said: "I am not in position to accept it." "This is a question of abandonment or consolidation. Now, consolidation aids labor while abandonment destroys labor. \* \* \* I am confident in my belief that the Harrington Amendment will not help labor. It would stand in the way of consolidation. Consolidations aid labor by keeping up lines that otherwise will have to be abandoned. Of course, it is a debatable question. No one can tell you that any particular labor or any particular number are going to lose their employment because of consolidations. Consolidations require, in the first place, the consent of the lines affected, a very difficult thing, on account of the matter of refinancing and other problems. It is very difficult to make consolidations. In the next place, no consolidation can be made unless it has the approval of the Commission" (p. 1263).

<sup>26</sup> The Conference Report—No. 2016, explains the changes in the consolidation features as follows (p. 64):

"The conference substitute provides for the retention of sections 5 and 213 as they are in the present law. \* \* \*

"These omitted provisions as to consolidation included the Harrington amendment which was adopted on the floor of the House. This amendment was adopted by the House as a protection against displacement of employees due to the consolidations that might result from the provisions of section 5. Employees had a fear of unemployment and to some

On the very day that the conferees made their report eliminating all changes in the consolidation provisions, including the Harrington amendment, April 26, 1940, the significant fact occurred of Mr. Harrington introducing a specific bill, H. R. 9563—"To prevent unemployment of railroad workers as a result of consolidations, combinations, agreements, or abandonments of railroads."<sup>27</sup> The proposed measure included protec-

extent communities feared the loss of transportation due to the possible consolidations under present circumstances where a revival of the transportation industry might show that such consolidations were unwarranted.

Undoubtedly it is against the best interest of the country to eliminate transportation facilities that may be temporary surplus facilities but have the economic need and justification under normal economic conditions.

In any event the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions."

<sup>27</sup> H. R. 9563, 76th Cong., 3d Sess., is short. It provides:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division of traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting abandonments under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads involved in such transaction, or in the impairment of existing employment rights of said employees."

tion of labor in abandonment cases. It is apparent that the introduction of this bill resulted from the action of the Committee of Conference on S. 2009 in eliminating Section 8 of that bill as passed by the House, which included the Harrington amendment. To our knowledge, H. R. 9563 was never reported out of Committee. But it does indicate that Mr. Harrington was dissatisfied with the treatment of labor in the Conference Committee report released the same day, and to meet the omissions of that bill, introduced his own bill, covering not only labor protection authority in consolidation cases, but in abandonment cases also.

At this juncture, Chairman Lea of the House Committee, spoke on the pending Transportation Bill, (Daily Cong. Rec. May 3, 1940, pp. 8516-8517) in the course of which he read a telegram to him, dated April 29, 1940, from Mr. A. F. Whitney, described as "the leader of this movement for the Harrington amendment", in which Mr. Whitney said:

"Please be advised that opposition Brotherhood Railroad Trainmen to Senate bill 2009 was based upon the consolidation section of the bill. Now that conferees have eliminated that section, the source of our opposition is eliminated. However, we shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations" (p. 8517, Daily Congressional Record, May 3, 1940).



Continuing, Mr. Lea said:

"It will be observed that the telegram confirmed the previous understanding of the conferees—that opposition was based upon the consolidation sections of the bill. The sentence of the telegram, 'Now that conferees have eliminated that section, the source of our opposition is eliminated,' confirmed our understanding of the situation. The last sentence of the telegram stating, 'We shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations,' was construed in light of the fact that Mr. Harrington 'filed a separate bill' proposing to deal with that situation" (p. 8517).

Discussing another revised Harrington amendment,<sup>28</sup> made a subject for a motion to recommit on

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<sup>28</sup> This revised Harrington amendment provided:

"(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination, mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment. [Italics added.]

Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or

May 2, 1940, by Mr. Wadsworth (Cong. Rec. Vol. 86, part 5, 76th Cong. 3d sess., p. 5427), Mr. Lea stated:

"A consolidation contemplates the general continuance of the service of a carrier but the possible or probable reduction in the number of its employees. The proposal that the Commission be authorized to require as a condition of its approval of a consolidation that fair and equitable arrangements be made to protect the interest of the employees is the same as was embodied in the House bill as reported to the House. It was adopted without any opposition in the House committee reporting the bill. It manifested the desire of the House committee to give fair and reasonable protection to employees dismissed by reason of consolidations" (p. 8516).

On May 9, 1940, the Conference Report was called up in the House (Cong. Rec. Vol. 86, part 6, p. 5836, 76th Cong., 3d Sess.) and Chairman Lea reviewed the history of the bill and the insertion of the Harrington amendment and in connection with the motion to recommit of Mr. Wadsworth, Mr. Lea said (Congressional Record for May 9, 1940, Vol. 86, part 6, p. 5864):

"This amendment goes beyond the Harrington amendment. It includes abandonments, in case of substitute railroad service, \* \* \*

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carriers by railroad and the duly authorized representative or representatives of its or their employees" (p. 5428—Vol. 86, part 5, Cong. Rec., 76th Cong., 3d Sess.).

When a railroad is abandoned its tracks are torn up and the investment is largely destroyed, and to apply the same test or requirement as to taking care of labor in abandonments as in cases of consolidation is entirely unwarranted."

In explaining the reasons for his amendment, on May 9, 1940, Mr. Harrington, at page 5869, said:

"MR. HARRINGTON. Mr. Speaker, when I offered my amendment last July I did so because there was no protection in the bill for the employees in the event of consolidation, nor is there adequate protection for them in the present law, and it is for this reason, and this reason only that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the change in the present law which will contain the consolidations sections requested by the railroads."

Mr. Wolverton, one of the conferees, at page 5878, said:

"\* \* \* After long and careful consideration of the matter by the conferees it was decided that the best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of wholesale dismissals that the Harrington amendment sought to protect railroad employees against."

On May 9, 1940, the House, by a vote of 209 to 182, adopted Mr. Wadsworth's motion to re-

commit directing the conferees to include, among other things, the revised Harrington amendment.<sup>29</sup> (Cong. Rec. May 9, 1940, Vol. 86, part 6, 76th Cong. 3d Sess., p. 5886.) Again the matter was considered by the conferees and on August 7, 1940, the conference report was submitted to the respective Houses. (See House Report No. 2832, 76th Cong. 3d Sess.) No material change was made in the abandonment sections of the act but again a revised compromise Harrington amendment was adopted by the conferees,<sup>30</sup> in which all reference to abandonments was omitted. The conference

<sup>29</sup> Printed in footnote 28, page 31, *ante*.

<sup>30</sup> It read:

"SEC. 5 (2) (f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of ~~four~~ years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

report (pp. 68-69) explained the reasons for revising the Harrington amendment:

"The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.

The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration."

On August 12, 1940, the conference report was called up in the House, and at page 10178 (Vol. 86, part 9, Congressional Record, 76th Congress, 3d Session), Chairman Lea said:

"Another provision was that where there is a substitution of transportation, for instance, by truck instead of rail, the employees of the abandoned line should have under those circumstances an order of the Commission fairly protecting their rights against unemployment. That is the only provision that is eliminated in this conference report."



Mr. Halleck, one of the conferees, explained the revised Harrington amendment as follows (p. 10187):

\* \* \* This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law.

Mr. HARRINGTON. Mr. Speaker, will the gentleman yield?

Mr. HALLECK. I yield to the gentleman from Iowa.

Mr. HARRINGTON. Does it take care of the employees with respect to abandonments?

Mr. HALLECK. I do not understand that it does, but I may say to the gentleman from Iowa that when he first offered his amendment the amendment did not take care of abandonments."

Mr. Wolverton, another House conferee, speaking of the Harrington amendment, said (p. 10189):

\* \* \* It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislative assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition

precedent for its approval in the Rock Island case, *United States v. Lowden* (308 U. S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if, necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining."

On the same date, August 12, 1940, a motion to recommit was rejected by a vote of 212 to 112, and the bill passed the House 247 to 75 (pp. 10193-10194, Cong. Rec. August 12, 1940, Vol. 86, part 9).

On August 30, 1940, the bill was submitted to the Senate (Cong. Rec., Vol. 86, part 10, 76th Cong., 3d Sess., p. 11269) and debated. On September 5, 1940, Senator Reed, one of the conferees, in answer to a question from Senator Mead, said:

"We have made provision for railroad labor in the so-called Harrington amendment—that is, the amendment which was called the Harrington amendment—which is satisfactory to all the operating brotherhoods, so far as I know. If there is any objection to it, I am not aware of it" (p. 11545).

On September 9, 1940, Senator Wheeler, Chairman of the Committee, submitted the following explanation of changes in the present law made by the Harrington amendment (Cong. Rec., Vol. 86, part 11, 76th Cong., 3d Sess., p. 11768):

"Present law is also amended by inclusion of the Harrington amendment, protecting employees in the event of consolidations and by directing the Commission to give weight to the following questions when passing upon any proposed transaction: First, the effect upon adequate transportation service to the public; second, effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved; third, the total fixed charges; and, fourth, the interest of the carrier employees affected. The Commission is also instructed not to approve any consolidation, merger, etc., which contemplates a guaranty of dividends, except upon a specific finding that such guaranty is not inconsistent with the public interest."

The bill passed the Senate on the same day (September 9, 1940) and on September 18, 1940, was signed by the President.

The legislative history is quite lengthy, on account of the tortuous course of the bill through the two Houses.<sup>31</sup> It is important, however, because it shows in our opinion that what the employees were primarily concerned with was protection for them in consolidation and unification cases and to put in statutory form what the carriers and labor had voluntarily agreed to in the Washington agreement. Whether similar provisions should be included in abandonment cases was regarded as highly controversial in nature. The brotherhoods, as shown by the testimony of Mr. Harrison, one of the Committee of Six, did not want to go so far, at least until they had a chance to take it up with the carriers and attempt to settle the question by collective bargaining. The significance of the action of Congressman Harrington in introducing on April 26, 1940, a separate bill to protect labor in abandonment as well as other types of cases—the same day the conference report came out showing there was no protection in the pending bill as to abandonments, is apparent, as is also the provision in the revised Harrington amendment on recommitment that

“as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrange-

<sup>31</sup> A chronology of the legislation follows as Appendix C, *infra*, pp. 76-77.

ment to protect the interests of the railroad employees affected.”<sup>32</sup>

When the conferees modified the bill to eliminate this feature which had created such debate and passed a bill with such protection deleted, it seems to us that Congress fully considered the question and decided not only that it had not conferred, but was declining to confer, upon the Commission the authority here invoked. The holding of the lower court to the contrary (R. 66) is a complete disregard of the legislative history. Consequently there is no need for the court to determine whether the general language “such terms and conditions as in its judgment the public convenience and necessity may require” includes protection of labor in abandonment cases, because the question has been answered by Congress. Whether such authority is desirable and should be granted is not for the Commission or for the courts. It is enough that such authority has not been granted.

In considering the legislative history of the 1940 act as a determinative of what Congress meant by a clause in the 1920 act relating “to such terms and conditions as in its [the Commission’s] judgment the public convenience and necessity may require”, we have a precedent in

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<sup>32</sup> The case before the Court involves not only abandonment of some lines but substitution of rail service by motor vehicle as to others (R. 27).



*United States v. Hutcheson*, 312 U. S. 219, where this court referred to the legislative history of the Norris-LaGuardia Act of March 23, 1932, in interpreting the Sherman and Clayton Acts. The 1920 and 1940 Transportation Acts constitute a "harmonizing text" (p. 231) and are not to be read as a "tightly drawn amendment to a technically phrased tax provision" (p. 235). See also *United States v. Lowden*, 308 U. S. 225, 237-239.

**II. A definitely settled administrative construction is entitled to the highest respect and if acted upon for a number of years, such construction will not be disturbed except for cogent reasons**

Section 1, paragraphs (18-20), added to the Act by the Transportation Act of 1920, were left virtually unchanged by the Transportation Act of 1940. Acting under the provisions of these paragraphs, the Commission between 1920 and October 31, 1941, granted 1,696 applications to abandon, involving 27,722 miles of road.<sup>33</sup> For 20 years the Commission has had before it for interpretation the same provisions regarding its authority over abandonments by railroad carriers.

As this Court has often held, contemporaneous or long-continued practice constituting interpretation of an empowering statute is entitled to great weight. Especially is this so where, as here, there has been substantial reenactment of the statute by Congress following the administrative

<sup>33</sup> The details will be found in Appendix B, page 75, *infra*.

interpretation. Mr. Justice McKenna, in *United States v. Hermanos*, 209 U. S. 337, at p. 339, said:

" \* \* \* and we have decided that the re-enactment by Congress, without change, of the statute which had previously received long-continued executive construction, is an adoption by Congress of such construction."

The first reported case in which the Commission was requested to exercise the authority sought was F. D. 10174, *Chicago Gt. W. R. Co. Trackage*, 207 I. C. C. 315 (May 14, 1935). For the first 15 years following the grant of authority to the Commission to impose such terms and conditions as the public convenience and necessity may require, no similar request to that here involved was made upon it, and apparently it did not occur to the Commission that it had such authority. This action of the body charged with the administration of the statute, together with the attitude of those most vitally affected thereby, constitutes a recognition that the statute did not confer such authority. In *United States v. Cooper Corp.*, 312 U. S. 600, 614, Mr. Justice Roberts said:

"In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy, seems to us the true explanation of the fact that no such actions have been instituted by the United States."

The language of this Court in declining to sustain an order of the Federal Trade Commission in

*Trade Commission v. Bunte Bros.*, 312 U. S. 349, 351-352, is appropriate:

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. \* \* \*

Moreover, the intervening Transportation Act of 1940 left unchanged the Commission's construction of the Act and lends great weight to the administrative ruling."

The Commission clearly and fully explained its declination of unwarranted authority in *Chicago Gt. W. R. Co. Trackage*, *supra*, decided in 1935. The Commission said (p. 321):

"It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In *Wis-*

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\* In *United States v. Amer. Trucking Assns.*, 310 U. S. 534, 549, this court said:

"In any case such interpretations are entitled to great weight. \* \* \*

It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation."

*consin Telephone Co. v. Railroad Commission*, 162 Wis. 383, 'Public convenience and necessity' was defined as 'a strong or urgent public need.' *Public-Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89.

"In the present case the conditions sought have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad with resulting unemployment. We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of attempting to insure employment to the personnel of carriers whether or not the affected employees were needed."

Then, referring to a decision construing section 5 (4), the consolidation provisions, the Commission declared:

"\* \* \* The present proceeding differs from that one in that it is brought under the provisions of section 1 (18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in section 5 (4) proceedings we are of the view that under section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from section 5 (4) and read into section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable.

Our sympathy for employees and full realization of the hardship that may and often does result to them in the administration of the abandonment and other provisions of section 1 (18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity."

This interpretation has been consistently followed by the Commission in subsequent cases, decided prior to and after this Court's decision in *United States v. Lowden, supra*.<sup>35</sup>

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<sup>35</sup> The cases referred to are as follows: *Atchison Topeka & Santa Fe Railway Company Abandonment*, 212 I. C. C. 423, 426; *Delaware River Ferry Company of New Jersey Abandonment of Operation*, 212 I. C. C. 580, 583; *Colorado and Southern Abandonment*, 217 I. C. C. 366, 381; *Pooling of Ore Traffic in Wisconsin and Michigan*, 219 I. C. C. 285, 294; *Chicago, Rock Island & Pacific Railway Company Trustees Abandonment*, 230 I. C. C. 341, 347; *Copper River & North Western Abandonment*, 233 I. C. C. 109, 113; *Gulf, Texas & Western Railway Company Abandonment*, 233 I. C. C. 321, 331; *Quincy, Omaha & K. C. Co. Abandonment*, 233 I. C. C. 471, 485-487; *Chicago, Springfield & St. Louis Railway Company Abandonment*, 236 I. C. C. 765, 770-772; *Tonopah & Tidewater Railroad Company Abandonment*, 240 I. C. C. 145, 150; *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment*, 240 I. C. C. 183, 185; *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment*, 240 I. C. C. 763, 771; the instant case, *Pacific Electric Railway Company Abandonment*, 242 I. C. C. 9, 23-24; *Southern Pacific Company et al. Abandonment*, 242 I. C. C. 283, 289-290; *Texas Electric Railway Company Abandonment*, 242 I. C. C. 765, 768; *Sacramento & Northern Railway Company Abandonment*, 247 I. C. C. 157, 158; *Texas & Pacific Railway Company Operation*, 247 I. C. C. 285, 293.



In *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment*, 240 I. C. C. 763, decided August 12, 1940, the Commission stated (p. 771):

“\* \* \* Relying upon the decision of the Supreme Court in *United States v. Lowden*, 308 U. S. 225, decided December 4, 1939, he contends that if the application herein be granted, in whole or in part, our certificate permitting abandonment should contain a condition requiring the applicants to compensate employees for losses which they may suffer by reason of discharge or transfer as a result of such abandonment. The above-mentioned decision, however, is the culmination of a proceeding involving the lease of railroad properties under section 5 (4) of the Interstate Commerce Act, as amended. The instant case is an abandonment proceeding under section 1 (18) of the act. The distinction between cases arising under section 1 (18-20) and those arising under section 5 (4) of the act, with respect to the Commission's authority to impose conditions affecting employees, is discussed in *Chicago, G. W. R. Co. Trackage*, 207 I. C. C. 315.”

This view was adhered to by the Commission in its decision in this case (R. 40-41):

On two occasions has this refusal to assume further power been called to the attention of Congress. In its 49th Annual Report, pp. 37-38, the Commission specifically referred to its holding in the *Chicago Great Western Case*, and recommended (p. 97):

"1. That further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

In its 50th Annual Report (p. 107) the Commission renewed its recommendation of the previous year.

"We feel it is pertinent that Congress, since the Commission's decision in the *Chicago Great Western Case* and its recommendations thereon, has seen fit to amend the Interstate Commerce Act in several particulars,<sup>36</sup> without conferring the authority sought. Most certainly this is not a situation in which Congress has acted in ignorance of administrative construction. Indeed Congress has required the Commission by law to report annually concerning questions connected with the regulation of commerce "together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."

Congress has had ample opportunity to vest authority in the Commission to provide for employees in abandonment cases. The section under consideration has been an integral part of our national transportation policy for some twenty years and although the act as a whole has under-

<sup>36</sup> August 9, 1935, 49 Stat. L. 543, and June 29, 1938, 52 Stat. L. 1236, and also by the Omnibus Transportation Act, 1940, approved by the President on September 18, 1940, 54 Stat. L. 898.

gone, transitions this section has remained practically intact. For at least six years in numerous decisions that section had received an undeviating interpretation. We submit that Congress, in amending the Interstate Commerce Act, has done so with full knowledge of the administrative interpretation placed upon that section of the act before this Court, and that Congress has rather expressly declined to confer the authority sought.

(a) The Commission is a creature of Congress, and has only those powers which are delegated to it by Congress.

The Commission is a creature of Congress, operating under delegated powers, and its jurisdiction is only that conferred upon it by law. (*Archison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248.) Its sphere is the regulation of carriers and, within the limits of its delegated powers, the Commission is supreme. The Commission's field is circumscribed by the language of the various acts under which it operates.

In *Kansas City Southern Ry. Co. v. Kansas City Terminal Ry. Co.*, 211 I. C. C. 291, at page 304, the Commission said:

" \* \* \* We are invested with no roving commission to carry out the policy of Congress; our powers are those delegated to us by the various sections of the Interstate Commerce Act and other acts which define the standards of right and obligation and delegate to us the function of finding the facts, determining the issues, and making the regulations necessary to give effect to those standards. \* \* \* "

In *Interstate Commerce Commission v. Los Angeles*, 280 U. S. 52, the Commission had denied its power to order the railroads serving the City of Los Angeles to build and use a new passenger station in that City. In holding that the Commission was correct in refusing to assume jurisdiction, this Court said (p. 70):

“ \* \* \* If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. \* \* \* ”

It is significant that in this case the Court was considering, among other provisions, sections 1 (18) and (20) of the Act.

In *Interstate Commerce Commission v. Oregon-Wash. R. Co.*, 288 U. S. 14, this Court held that the words in the statute that the Commission could require a carrier “to extend its line or lines” (p. 34)—which appear to us to be far more definite in nature than the words “such just and reasonable terms and conditions as in its judgment the public convenience and necessity may require”—were insufficient to sustain a Commission order requiring the railroad company to construct a line 185 miles long, across central Oregon (p. 28). The Court said, p. 35:

" \* \* \* We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service. \* \* \*"

Also, at pp. 35-36, this Court said:

"Moreover, if the purpose were that claimed by the Commission, support should be found in legislative history. But none has been called to our attention. In the report to Congress for 1919 the Commission reiterated an outline of the policies previously suggested for legislative action in view of the approaching termination of federal control. No intimation is given that carriers should be required to build into territory they had not undertaken to serve. The scope of the recommendation was not enlarged in the testimony before the committee of the Senate having the Transportation Act in charge."

How different is the legislative history in this case, discussed fully in chapter I.

It is also pertinent to inquire if mandamus would lie to compel the Commission to exercise the authority sought. In *United States v. Interstate Commerce Commission*, 294 U. S. 50, 63, this Court said:

" \* \* \* Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the stat-



utory power of an administrative officer or body. \* \* \*

Was the Commission "so plainly and palpably wrong as matter of law that the writ should issue"? (P. 61.) We think not. Should a different decision or rule be applied because the case comes up under the Urgent Deficiencies Act rather than by mandamus?

In *United States v. Cooper Corp., supra*, this Court said:

"\* \* \* it is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

In that case this Court also held that the connotation of a term in one portion of an Act may often be clarified by reference to its use in other portions (p. 606). The terms "public convenience and necessity" are contained not only in paragraphs (18) and (20) of section 1 but also in sections 203 (a) (2) and (5), 206 (a), 207 and 208 of Part II, and section 309 of Part III of the Interstate Commerce Act. Under the authority conferred upon the Commission by paragraph (21) of section 1 authorizing the Commission to require a carrier by railroad to "extend its line or lines," there is a proviso requiring the Commission to find "as to such extension," that it is reasonably required in the interest of "public convenience and necessity." The words "public convenience and necessity" as used in this last-

mentioned paragraph would hardly be construed broadly enough to include the interest of employees interested in the extension, but if they are not given that meaning, appellees' contention with respect to the authority of the Commission in abandonment cases, if adopted, means that the same words would have different meanings in the same Act, and in paragraphs applying to the same subject matter. Paragraphs (18-21) of section 1 are part of a single statutory scheme governing the construction of new lines and the abandonment of old lines. The Court will adopt a construction not contrary to "the scheme and structure of the legislation" (*Cooper Case, supra*).

(b) Analogy of words "public convenience and necessity" in state statutes

In 1920, when section 1 (18-20) was added to the Act, the words "public convenience and necessity" were used in some state regulatory statutes. The meaning given to these words by state tribunals has been accorded much weight by the Commission from its early days.<sup>37</sup> In *Wisconsin Tel. Co. v. Railroad Commission*, 162 Wis. 183, 156 N. W. 614, the state Court said (p. 617):

"\* \* \* The words 'convenience and necessity' mean urgent, immediate public need. *In re Appl. Shelton St. Ry. Co.*, 69 Conn. 626, 38 Atl. 362. So held under a statute prohibiting construction of parallel

<sup>37</sup> See *Public Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89, 93-94; *Public Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784, 792.

lines of street railroad except when public convenience and necessity required it. Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community. \* \* \* 35

\* Decisions of other tribunals were:

(California). A certificate to operate an auto stage or freight service, should be granted or withheld upon the basis of whether the rights, welfare, and interest of the general public will be advanced and not upon the private benefit or advantage that may accrue to any carrier, shipper, or consignee. *Re Motor Transit*, P. U. R., 1922 D, 495.

In Missouri, *Re McCartney*, P. U. R. 1928 C, 182 is a similar holding.

(New York). *In re International R. Co.* (1917), 6 P. S. C. R. (2d Dist. N. Y.) 174; the question was whether public convenience and necessity required the extension of street railway tracks. The Commission said: "Will this additional trackage add to the usefulness of the company's property as a whole? Will it enable the company to render more efficient and satisfactory service to its patrons? Can the members of the traveling public reach their several destinations more quickly and comfortably? If these things are so then private interests must not prevail."

(Rhode Island). The convenience and necessity mentioned in a statute authorizing a commission to determine whether public convenience and necessity require the operation of jitneys, must be "public" in its nature, and all considerations that are merely private or selfish should be eliminated. *Re Applications for Certificates to Operate Jitneys*, P. U. R. 1922 E, 612.

(Colorado). The needs or necessity of the carrier cannot be the controlling factor in determining whether a certificate of public convenience and necessity should be issued, but the question to be determined is what is necessary so far as the public is concerned. *Re-Bross Application*, No. 3946 B, Docket No. 12744, Dec. 19, 1938.

(Maine). Convenience and necessity which the law requires to support the Commission's order in grant of appli-

The Court will be interested in what meaning the Commission has given to the words "public convenience and necessity." In *Public-Convenience Application of Utah Terminal Railway*, 72 I. C. C. 89, at pp. 93-94, the Commission said:

"\* \* \* 'Public convenience and necessity' has been defined as 'a strong or urgent public need.' *Wis. Telephone Co. v. Railroad Comm.*, 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field \* \* \*."

In *Public-Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784 at page 792, the Commission stated:

"\* \* \* That such operation would be a matter of convenience to the two remaining shippers of fish may be conceded, but it

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cation of convenience and necessity is the convenience and necessity of the public as a whole, as distinguished from that of an individual or group of individuals. *Re Stanley* (1934), 5 P. U. R. N. S. 359, 133 Me. 91, 174 Atl. 93.

(South Dakota). Authority to operate as a motor carrier will not be granted because the applicant has purchased a truck, needs the work, would lose his truck and all that he has invested in it if his application is denied, and he needs the permit to do trucking in order to keep off of relief, since the law relating to establishing public convenience and necessity requires a showing of a demand on the part of the public for the service proposed and the Commission is unable to give weight to reasons which are entirely personal. *Re Yahne*, Order No. 7254 B, March 29, 1937.

can hardly be said to be a matter of necessity. The term 'public convenience and necessity' implies both convenience and necessity since the words are not synonymous but must be given a separate and distinct meaning \* \* \*"

In *Ocean S. S. Co. of Savannah*, 203 I. C. C. 155, 163, the Commission said:

"'In the public interest' is an elastic and significant phrase, but it can hardly be expanded to include the conditions and practical requirements of a certificate of convenience and necessity under paragraph 18 of section 1 of the act."

(c) Nature of "terms and conditions" imposed by Commission in abandonment cases

A question of interest is what general meaning the Commission may have given in illustrative cases, to the words "terms and conditions" as used in the paragraph. In *Certificate for Eastern Texas R. R.*, 65 I. C. C. 436, the Commission granted permission to abandon a line on condition that before one year thereafter the applicant shall furnish to the Commission a good and sufficient bond that it will within that period pay all outstanding obligations. In *Abandonment of Branch Lines by Detroit & Mackinac Ry.*, 131 I. C. C. 9, the Commission stated that abandonment of a line may be conditioned on the sale of the line within a specified time at a price not exceeding its scrap value to any person, firm, or corporation



desiring to purchase same for continued operation.<sup>39</sup>

### III. The decision in *United States v. Lowden*, 308 U. S. 225, is not controlling

Appellees base great reliance upon the decision of this Court in *United States v. Lowden*, 308 U. S. 225. In that case the Court was construing Section 5 (4) of the Act, which contained the following provision:

"If \* \* \* the Commission find that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable*, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control \* \* \* will promote the *public interest*, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon the terms and conditions and with

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<sup>39</sup> Other Commission decisions are:

In *Abandonment of Branch Line by New York, New Haven & Hartford R. R.*, 90 I. C. C. 3, a certificate for branch line abandonment, was issued on condition that the applicants shall sell such line to the city in which it is located.

In *Abandonment by Southern Ry.*, 145 I. C. C. 355, in authorizing abandonment the Commission required the applicant to provide a truck service or other means of transportation for products ready for shipment, and to charge for such service the same rates that it would have charged for freight service.

In *Norfolk & Western R. Co. Abandonment*, 193 I. C. C. 363, the Commission held that an abandonment may be authorized on condition that applicant donate to the proper county authorities certain portions of its right-of-way.

the modifications so found to be *just and reasonable.*" [Italics supplied].

There are important distinctions between that case and this. In the first place, in the *Lowden Case* the Court was affirming an interpretation placed upon a disputed statute by the body charged with its administration; here the Court is being asked to reach a conclusion contrary to that of the administrative tribunal. The test in the *Lowden Case* was the "public interest" while the test here is "public convenience and necessity," which have a narrower meaning than the words "public interest." The distinction is explained in the Commission's report in this case (R. 40-41). In sustaining the Commission's action in the *Lowden Case*, the Court referred to the history of railroad labor relations in the United States in mitigation of the hardship imposed on the employees in carrying out a national policy of railway consolidation, which would have to be disregarded. That history was supported by reference to the Washington agreement and the report of the Committee of Six, seeking the protection of labor in consolidation cases. Neither the Washington agreement nor the report of the Committee of Six cover protection of labor in abandonment cases. In sustaining the Commission's action in the *Lowden Case*, the Court referred to the legislative history of S. 2009. A similar consideration here of the legislative his-

tory of that bill, as discussed in Chapter I of this brief, leaves no doubt that the Commission was right in its conclusion. At page 239 of the Court's decision in the *Lowden Case*, this Court referred to doubts that the Commission had at one time entertained as to its authority in consolidation cases, which doubts had gradually been removed by an assumption of such authority. No such doubts can be relied upon in this case, because the Commission has consistently taken the view that the statute does not confer the authority sought. Finally at pages 239-240 of this Court's decision in the *Lowden Case*, the Court referred to "the congressional judgment of those conditions," which "congressional judgment" here shows overwhelmingly, in our opinion, that there is no basis for the contention that Congress has conferred the authority invoked. Then the *Lowden Case* emphasized the national policy of consolidation and referred to the duty imposed upon the Commission as to plans of consolidation. This duty was removed by the 1940 Act.

The fact that the Commission can attach conditions for the protection of labor in a consolidation case, while it may not in an abandonment case, is entirely logical. In some cases abandonment proceedings may, and frequently do, precede complete liquidation of railroad carriers, usually short lines which have outlived their usefulness and are no longer capable of anything like profitable oper-

ation. A requirement that such abandonment could be permitted only on condition that the employees be continued in their jobs would be a complete contradiction and an impracticability, because of the fact that discontinuance of operations would remove the only source of income from which the wages of the employees could be paid.

When a railroad carrier abandons a part of its line, usually a branch, the compelling reason commonly is a permanent loss of traffic which entails a financial burden on the other parts of the system (Cf. *Colorado v. United States*, 271 U. S. 153, 163). The abandonment permits the railroad company to reduce its investment in the abandoned facilities and the taxes thereon. The employees engaged in operations on an abandoned branch,<sup>40</sup> however, do not lose their status as employees of an operating railroad company, as they usually do if their company were absorbed by an-

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<sup>40</sup> In the complaint (R. 3) it is alleged that employees will experience a net wage loss of \$301,896 annually. The Commission did not go into this because of its view that it had no authority to protect labor. Based on the unions' estimates, the Commission did state that the calculations indicated aggregate savings of \$378,229, including a total of \$301,996 as the cost of labor (R. 40). The Railroad Company, as the party possessing knowledge of these facts (R. 54), denied an annual net wage loss in any such amount, or in any amount in excess of \$1,000 a month for a period not to exceed nine months, during which time it stated it would absorb back into its service all employees displaced (R. 54). If, as we contend, the Commission has no authority in this type of case, the question of wage losses is irrelevant.

other under a unification, but remain eligible for continued employment by the company to the extent that its business permits. In this respect their position is practically the same as that of employees who may be laid off by the railroad because of reduced operations on other parts of a system where the decline in traffic has not been so severe as to compel abandonment of those parts.

There is no provision of law which insures employment to the latter employees, who would be left in a less favorable position than that of employees on abandoned branch lines protected against unemployment. Even the voluntary agreement between railroad management and labor known as the Washington agreement covers only "those changes in employment in the Railroad Industry solely due to and resulting from coordination."<sup>4</sup> It was agreed "that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement."

Congress has provided for the protection of dismissed railroad employees under the Railroad Un-

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<sup>4</sup> The Washington agreement defines "co-ordination" as meaning joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.



employment Insurance Act, 45 U. S. C. A., Section 351 *et seq.*

In 45 U. S. C. A., Section 363a, it is provided:

"By enactment of this chapter the Congress makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, \* \* \*"

Prior to this bill, the Federal Co-ordinator of Transportation in his Fourth Annual Report, had referred to his dismissal compensation bill (p. 55) involving consolidations, mergers, and unifications of facilities and concluded (p. 57) "that the best way of solving this problem would be by agreement, after negotiations, between the managements and the labor organizations. No constitutional limitations affect such agreements, and they have the advantage of being flexible and capable of change from time to time as need therefor may be shown in the light of actual experience." "

While it will be urged that the authority invoked here is merely discretionary in the Commission, and cases may be cited showing it would

<sup>42</sup> Fourth Annual Report, House Doc. 394, 74th Cong., 2d Sess. At page 54 of the report, the Co-ordinator said:

"The Co-ordinator entertains no doubt, therefore, that if the railroads are to progress and grow and build up business which will increase the sum total of railroad employment, it is essential that they utilize labor-saving devices, methods, and practices to the maximum and see to it that the low costs so attained are translated into rates and fares which will attract traffic."

apparently be no hardship for carriers to care for employees displaced by abandonments, our position is that Congress did not draw any line between discretionary and mandatory authority; it declined in all instances to extend this debated and much-disputed authority to the Commission.

The effect on the revenues of interstate carriers should the Commission be required even as a matter of discretion to impose conditions to protect labor in cases of the abandonment of unprofitable branch lines would be contrary to the scheme and spirit of the Transportation Act of 1920, seeking to provide the people of the United States with an adequate system of transportation (*New England Divisions Case*, 261 U. S. 184, 190).

Public convenience and necessity would be seriously interfered with if it were held that because a carrier abandoned a line operated at a loss it must pay compensation to employees.<sup>43</sup> Losing lines are abandoned because they are a drain on the system and in order to terminate the drain, and because their continued operation, as the Commission found here, would be a "burden on interstate commerce." (R. 41.)

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<sup>43</sup> The Commission stated: "For the past eight years the applicant has incurred deficits in net railway operating income ranging from \$17,743 in 1936 to \$826,505 in 1938, and a deficit of \$608,989 in 1939." (R. 36.)

**CONCLUSION**

The decision of the lower court should be reversed and the complaint dismissed.

Respectfully submitted.

DANIEL W. KNOWLTON,  
*Chief Counsel,*

E. M. REIDY,  
*Assistant Chief Counsel,*  
*For Interstate Commerce Commission.*

## APPENDIX A

### Pertinent statutory provisions

(Amendments made by Transportation Act, 1940, shown in italics.)

#### NATIONAL TRANSPORTATION POLICY

*It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*

Section 1 (18-22) of the Interstate Commerce  
Act:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. *Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.*

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from times to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application



for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

“(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any

party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.

“(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

“(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construe-

tion or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 5 of the Interstate Commerce Act, as amended September 18, 1940, reads, in part, as follows:

"Sec. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration

as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

“(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

“(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to

acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a) ~~the~~ the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction; upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of



paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or as-

sumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

“(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions, providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.”

Section 5 prior to the Transportation Act of 1940 read, in part, as follows:

“(1) That, except upon specific approval by order of the Commission as in this

section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

(2) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practi-

cable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

(3) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to



operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

“(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable.”



## APPENDIX B

### Table of abandoned mileage

Summary of all abandonment applications between 1920 and 1934 as contained in the Commission's 48th Annual Report dated December 1, 1934, p. 20:

Year ended October 31	Number of certificates issued per- mitting abandonment	Miles per- mitted to be abandoned	Year ended October 31	Number of certificates issued per- mitting abandonment	Miles per- mitted to be abandoned
1920			1929	48	539.53
1921	31	501.93	1930	72	1,807.46
1922	30	528.53	1931	89	1,019.31
1923	19	523.41	1932	90	1,418.27
1924	30	453.83	1933	129	2,404.26
1925	46	651.97	1934	154	2,514.22
1926	49	592.56			
1927	52	830.61	Total	900	14,570.94
1928	61	587.05			

<sup>1</sup> Includes 881.65 miles of which the Delaware & Hudson Co. was permitted to abandon operation and which was acquired and operated by the Delaware & Hudson Railroad Corporation, a new company.

Subsequent annual reports bring this information up to date as follows:

Year ended October 31	Number of certificates issued permitting abandonment	Miles per- mitted to be abandoned	Annual report
1935	100	1,691.82	49th (pp. 147-149).
1936	116	1,902.99	50th (pp. 152-154).
1937	116	1,547.37	51st (pp. 157-159).
1938	123	2,014.05	52d (pp. 166-168).
1939	106	2,137.79	53d (pp. 182-184).
1940	134	1,919.40	54th (p. 51).
1941	111	1,938.00	55th (Unprinted).
Total	796	13,151.42	
Grand total 1920-1941	1,696	27,722.36	

## APPENDIX C

### Chronology of S. 2009

September 20, 1938—Committee of Six appointed by the President.

December 23, 1938—Report of Committee of Six submitted to the President.

January 13, 1939—H. R. 2531 introduced in House by Chairman Lea.

March 8, 1939—H. R. 4862 (Committee of Six Bill) introduced in House by Chairman Lea.

January 24–March 30, 1939—Hearings before House Committee on H. R. 2531 and H. R. 4862.

March 30, 1939—S. 2009 introduced in Senate by Senators Wheeler and Truman.

April 3–14, 1939—Hearings on S. 2009 before Senate Committee on Interstate Commerce.

May 12, 1939—S. 2009, as agreed to by full Senate Committee, printed.

May 16, 1939—S. 2009 reported to Senate with amendments.

May 22–25, 1939—S. 2009 debated in Senate.

May 25, 1939—S. 2009 passed the Senate.

May 29, 1939—S. 2009, as passed by the Senate, referred to House Committee on Interstate and Foreign Commerce.

July 18, 1939—S. 2009 reported by House Committee, with amendments.

July 21–26, 1939—S. 2009, as reported out by House Committee, debated in House of Representatives.

July 26, 1939—S. 2009 passed the House of Representatives, with amendments.

July 29, 1939—S. 2009 sent to conference.

January 29, 1940—Letter from Legislative Committee of the Interstate Commerce Commission transmitting report on S. 2009 as passed by both Houses.

April 26, 1940—Conference Committee reported bill to their respective Houses.

April 26, 1940—H. R. 9563 introduced by Congressman Harrington.

May 9, 1940—Bill recommitted by House.

August 7, 1940—Bill again reported out by Committee of Conference.

August 12, 1940—Conference report adopted in House.

August 30–September 9, 1940—Conference report debated in Senate.

September 9, 1940—Conference report agreed to by Senate.

September 18, 1940—Bill signed by President.

FEB 2 1942

CHARLES E. SMITH

No. 223

**In the Supreme Court of the United States**

OCTOBER TERM, 1941

INTERSTATE COMMERCE COMMISSION AND THE  
PACIFIC ELECTRIC RAILWAY COMPANY, APPEL-  
LANTS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND  
BROTHERHOOD OF RAILROAD TRAINMEN, APPEL-  
LEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
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REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION

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REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION

1. The appellees, in support of their contention that the Commission, in authorizing abandonments of railroad lines, is empowered to impose conditions for the protection of railroad employees, rely on the fact that the Commission has such authority in cases of consolidation (*United States v. Lowden*, 308 U. S. 225), and their view that its authority is not different in cases of abandonment. Their argument in support of this view is largely

(1)



predicated on the proposition, which we believe to be unsound, that, while the statute uses different language and standards in the two sections of the Act involved, no distinction of any substance was intended to enter into the different standards prescribed (Br. 14).

Congress in committing to the Commission the matter of consolidations, etc., by section 5 (4) of the Act, empowered it to attach such conditions as it shall find to be *just and reasonable* and promotive of *the public interest*; whereas, in committing to the Commission the matter of abandonments by section 1 (18)-(20) of the Act, it empowered the Commission to attach such conditions as in its judgment are required by *the public convenience and necessity*. Despite the different standards employed by Congress, the appellees urge that there is no distinction of substance between the standards laid down, and, in effect that, therefore, since the factor of protection of railroad employees enters into *the public interest*, it also enters into *the public convenience and necessity* (Br. 14). This position is, we believe, untenable. Disregarding for the moment the fact that appellees' contention practically ignores the other standard giving the Commission authority to attach conditions that it finds to be *just and reasonable*, the standard of *the public interest* is plainly broader than the standard of *the public convenience and necessity*, and recognition has to be given

to this, for the reason, if no other, that appellees' position that there is no distinction between those standards assumes that Congress' use of different standards was without purpose.

The only authority cited by appellees, in support of their position that there is no distinction between the different standards laid down by Congress is the statement made in a text book to the effect that the standard of public convenience and necessity "but sets up the usual standard of *public interest* and thus leaves the determination of concrete policy to the administrative tribunal." (Br. 13). This statement is obviously loosely made and is of little more significance than the fact that, as also relied on by appellees, Court and Commission decisions quite often refer to the Commission's finding of public convenience and necessity as a finding of public interest. Of greater significance is the fact that appellees mention no instance where the broader finding of public interest is referred to as a finding of public convenience and necessity. And we are unable to recall any instance where, for example, the Commission's finding of public interest under section 20a, or under section 5, of the Act is referred to as a finding that an issue of securities, or a consolidation, is consistent with the public convenience and necessity.

As stated by appellees (Br. 11), the purpose of Transportation Act, 1920, of developing an ade-

quate and efficient transportation service for the country was sought to be implemented by giving the Commission authority over many matters not theretofore committed to it, including authority over the extensions, or abandonments, of lines pursuant to section 1 (18). But it does not follow that, because the protection of employees (Br. 16) is a matter related to that Act's purpose of securing an adequate and efficient transportation service and is a factor entering into the public interest in consolidation cases (*United States v. Lowden*, 308 U. S. 225, 231), that it is also a factor entering into the *public convenience and necessity* either as a factor against the authorizing of an abandonment, or as a factor for the imposing of a condition for protection of employees, if the abandonment be authorized.

In the first place, contrary to the assertion of the appellees, the abandonment provisions do not occupy a position in Transportation Act, 1920, anything like the position occupied by the consolidation provisions. As emphasized by the *Lowden* case, *supra* (232), the consolidation provisions embody a national policy to encourage consolidations which policy has itself imposed severe hardships on railroad employees (Br. 9, 10). While a clause prohibiting consolidations without Commission approval was added to the consolidation provisions (Sec. 5 (6)) in 1933, prior to that time the only federal restraints preventing consolidations were the antitrust laws; and these, of

course, continue to operate as such and are a restriction upon consolidations until Commission approval is secured (Sec. 5 (11)). The consolidation provisions evidence the policy to encourage consolidations by placing consolidations authorized by the Commission outside the anti-trust laws and by directing the Commission to prepare a plan of consolidation of the railroads of the country. This policy did in fact greatly stimulate consolidations and, as shown by appellees, cast a heavy burden on railroad employees (Br. 9). On the other hand, there is no national, or statutory, policy to encourage abandonment of lines. The statute has from the time of its enactment in 1920 prohibited the abandonment of lines unless Commission authority was first obtained. While Congress, by the enactment, superseded state authority as to certain branch lines within state boundaries (*Colorado v. United States*, 271 U. S. 153), those lines were placed under the federal prohibition against abandonments together with the whole country-wide system of interstate lines. It is clear that the abandonment provisions embody no such policy as the consolidation provisions. The Commission is not directed to formulate a plan to accomplish the abandonment of railroad lines and Congress' relaxation of the antitrust laws has no application to abandonments.

In the second place, consistently with appellees' view that, because abandonments of lines de-

prive of employment, the effect on railroad employees is a factor entering into the determination as to whether the public convenience and necessity permits thereof, it might be urged that, because extensions of lines provide employment, such favorable effect is a factor entering into the determination as to whether the public convenience and necessity requires proposed extensions.<sup>1</sup> The prescribed standard is the same, namely, the public convenience and necessity; and the fact is that the cases which most emphasize the part played by section 1 (18) in the purpose of Transportation Act, 1920, to secure an adequate and efficient transportation service are *Texas & Pacific Ry. v. G. C. & S. F. Ry.*, 270 U. S. 266, and *Piedmont*

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<sup>1</sup> The mention by appellees (Br. 11-12) of various provisions which were added to the Interstate Commerce Act by Transportation Act, 1920, brings to mind that there were many provisions added at that time, and many amendments made (41 Stat. 456; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456; *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563) in most of which there was embodied the purpose of the 1920 Act to promote an adequate and efficient transportation service. Basically appellees' argument that there is no distinction between the standards governing consolidations and those governing abandonments in the matter of effect on railroad employment, might, if sound at all, be extended to each and every of the other provisions designed to implement said purpose of Transportation Act, 1920. But this Court's opinion in the *Lowden Case*, *supra* (232), shows that the decision has no application to "isolated" transactions. The consolidation provisions are to be considered by themselves and as embodying elements amounting to factors peculiar to those provisions.



*& Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 311-312, which are cases involving extensions, instead of abandonments, of lines. But we find it difficult to believe that the effect on railroad employment whether in the case of proposed extensions of operations, or in the case of abandonments, is a factor entering into the public convenience and necessity. In this connection we find no answer in appellees' brief to the point we make in our main brief (pp. 51-52) where we said:

"\* \* \* Under the authority conferred upon the Commission by paragraph (21) of section 1 authorizing the Commission to require a carrier by railroad to 'extend its line or lines,' there is a proviso requiring the Commission to find 'as to such extension,' that it is reasonably required in the interest of 'public convenience and necessity.' The words 'public convenience and necessity' as used in this last-mentioned paragraph would hardly be construed broadly enough, to include the interest of employees interested in the extension, but if they are not given that meaning, appellees' contention with respect to the authority of the Commission in abandonment cases, if adopted, means that the same words would have different meanings in the same Act, and in paragraphs applying to the same subject matter. Paragraphs (18-21) of section 1 are part of a single statutory scheme gov-

erning the construction of new lines and the abandonment of old lines. The Court will adopt a construction not contrary to 'the scheme and structure of the legislation' " (*Cooper case, supra*).

However, it is believed that the legislative history set forth in our main brief (Br. 9-38) affords the most complete answer to the contention of the appellees in chapter 1 of their brief. It is there shown very definitely, we think, that Congress had in mind the differences between the language in the abandonment section and the language in the consolidation section, and rejected the point made here that they mean one and the same thing.

2. The second point urged by appellees is that the Commission's consistent administrative interpretation is entitled to no weight for a number of reasons, the first of which is that its decision in the *Chicago G. W. Ry. Case*, 207 I. C. C. 315, was erroneous in the first instance. No effort was made to have this decision reviewed in the courts, and it has been consistently followed by the Commission in decisions prior and subsequent to this Court's decision in the *Lowden case*. It is also urged that the Commission's interpretation dealt with a subject outside the sphere of its technical knowledge, consequently it is entitled to "relatively little weight" (p. 25 of appellees' brief). This is to urge that the Commission is a body of experts when it answers in the affirmative, but is not a body of experts when its answer is in the negative.

Next it is urged that while contemporaneous construction of a statute is entitled to some weight, this statute was enacted in 1920 and there was no construction of it in the particulars involved here until 1935. There are two answers to this proposition: (1) The Commission was never asked prior to its decision in 1935, to impose conditions such as those here sought, consequently there was no need prior to that date for it to make any utterances with respect thereto. Since that date and up to the present time its decisions have all been one way, and appellees do not dispute this. (2) The kind and nature of the terms and conditions that the Commission has felt it could impose in abandonment cases, from the time of the enactment of these provisions in 1920, have been set out in our main brief (Br. 55-56).

3. The legislative history is attempted to be explained away (pp. 30-58 of appellees' brief), but we think without success. At page 34 of its brief appellees urge, with respect to the legislation culminating in the Transportation Act of 1940, "that the purpose of Congress was such that the protection of employees injuriously affected by consolidations of railroads was a necessary and integral part of that purpose, while a similar protection in relation to abandonments was entirely foreign thereto."

The *Lowden Case*, holding that the Commission had authority to impose conditions in consolida-

tion cases, was decided by this Court in December, 1939. The Transportation Act was not finally approved until September 18, 1940. If appellees' contention in this respect is to be adopted, it appears that Congress was devoting considerable time and energy to inserting in the law authority which this Court had already held the Commission had. We can agree with the statement made on page 42 of appellees' brief:

"The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management and railroad labor."

This statement does not coincide with appellees' argument that the Commission's authority to impose terms and conditions such as here sought has been so clear since 1920 that resort to legislative history is unnecessary. Their statement that the question of employee protection in cases of abandonment was, and still is, a bitterly contested one, carries with it the thought that there is very good ground for doubt that the Commission is already vested with authority over the matter, and yet their position here is that that should be held to be the case predicated on the use by Congress of the general words public convenience and necessity.

At page 43 of appellees' brief a quotation is given from the testimony of Mr. Harrison before the House Committee. We note that a line has been inadvertently omitted in the next to the last

paragraph of the indented portion appearing on page 43 and, as it seems of some materiality, we are reproducing the paragraph with the omitted portion italicized. It reads as follows:

"Now, if the Government should intervene through its powers and undertake to bring about abandonments, of course, that is a new situation for us and we think *we would insist that those matters ought to be considered and we think* it would be fair if governmental assistance was brought into the abandonments of properties, that the Government should then provide for protection in those instances."

In repeating this language at the top of page 44 of appellees' brief, the same insertion should be made.

It is urged at various places in the brief of appellees that the question of employee protection in abandonment cases was not placed before Congress "in any emphatic way" (Br. 53); and that it was not actually placed before the Congress (Br. 55); but only in "three fleeting appearances on the stage" (Br. 55). At the same time it is admitted (pp. 55-56) that all testimony concerning abandonments when placed in one brief "may be made to assume an impressive appearance" (Br. 55-56). These statements are not entirely consistent. The fact of the matter is that the legislative history is wholly convincing of the contentions made by the Commission in its main brief



and, as pointed out by Mr. Harrison in his testimony before the House Committee, when he in effect said that the Washington Agreement would protect labor in consolidation cases, if they wanted further protection in abandonment cases, the matter should be taken up with the carriers. Mr. Harrison in his testimony, when asked by Congressman Wolverton if there were any suggestions made by either management or men that have merit and that do not appear in the report of the Committee of Six, answered as follows:

"Mr. HARRISON. No, I would say this, Congressman: We tried to be realistic about it and if I were writing a prescription for the railroads and had the power of Mussolini or Hitler I think I could give you a panacea; but on the other hand, realizing that this is a democratic country and you can only go so far as public opinion will support you and the practicalities of the situation would warrant, I think the Committee of Six reached a conclusion upon what was within the realm of possibility and we have no recommendations whatever not contained in the report" (p. 226 of House Hearings):

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**CHARLES FLORE CROPLEY**  
CLERK

IN THE

**Supreme Court of the United States**

**October Term, 1941**

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**No. 223**

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**INTERSTATE COMMERCE COMMISSION AND THE  
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*vs.*

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BROTHERHOOD OF RAILROAD TRAINMEN,**

*Appellees.*

---

**BRIEF OF APPELLEES**

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**BRIEF OF APPELLEES**

---

**Statement of the Case**

This case comes before this court on appeal from a decision of a three-judge statutory court convened in the District of Columbia, which decision set aside an order of the Interstate Commerce Commission.

The facts out of which the issues of the case arise are briefly these: The appellant, Pacific Electric Railway Company, filed an application with the Interstate Commerce Commission for the issuance of a certificate of public convenience and necessity, authorizing it to abandon certain

of its rail lines in and near the City of Los Angeles, California. The contemplated abandonment was not to constitute a withdrawal of the applicant from the transportation field in this area or in any part of it. It was rather a phase of a more comprehensive program designed to bring about a rearrangement of the rail, motor bus, and motor truck service of the carrier in such manner as to enable it to render transportation service to the same communities as before, but with a higher net return from its total operations. (R. 53-54.)

The appellees entered their appearance at the hearings conducted by the Interstate Commerce Commission and urged that if the requested certificate should be granted, it should be made subject to conditions which would afford a measure of protection to those employees who would lose their positions as a result of the contemplated abandonment. This contention was predicated upon the language of Section 1(20) of the Interstate Commerce Act (U. S. C. Title 49, Section 1, Paragraph (20)), which provides that in cases of this kind, the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The Commission, acting through its Division 4, authorized the issuance of a certificate to the applicant but refused to attach thereto any conditions for the protection of employees. This refusal was on the ground that it lacked jurisdiction to impose such conditions under the statutory language just quoted. (*Pacific Electric Railway Company Abandonment*, 242 I. C. C. 9.)\* A petition for reargument before the full Commission was denied, and this action was filed seeking to set aside the decision to the

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\* One of the three commissioners in Division 4 dissented as to the existence of jurisdiction in the Commission to impose conditions for the protection of employees.

extent that it disclaimed jurisdiction to impose or to consider the imposition of conditions for the protection of employees. The three-judge court reversed the Commission, and granted the relief asked in the complaint. (*Railway Labor Executives' Association et al. vs. United States et al.*, 38 Fed. Supp. 818.) As above stated, the case comes to this court on direct appeal.

The single issue presented by the appeal is this: In abandonment cases filed under Section 1(18-20) of the Interstate Commerce Act, does the Interstate Commerce Commission have jurisdiction under the statute to impose conditions for the protection of employees who will be injuriously affected?

It is, of course, the contention of the appellees that the Commission has the jurisdiction which it disclaimed; that in the complete exercise of its statutory authority in relation to abandonment cases, it is obligated to give consideration to the effects of the proposal upon employees, and that it is further obligated to explore the possibilities of alleviating those effects by protective conditions appropriate under the circumstances.

We wish to make it very clear that while specific conditions were proposed to the Commission in this case, we do not contend that the Commission is obligated to impose those conditions or any other specific conditions in this or any other case. There may be abandonment cases where protective conditions cannot properly be imposed at all. There may be cases where certain conditions for employee protection are appropriate and are required by the public convenience and necessity, while in other cases, these conditions would be inappropriate. We seek to impose no iron-clad rule upon the Commission in this regard. We do insist, however, that it has jurisdiction to consider this phase of the public convenience and necessity; that, having

the authority, it is obliged to give it such consideration as the facts of the case warrant, and that its failure so to do amounts to an incomplete exercise of its statutory authority and an error of law.

In supporting our position, we will, in the first place, look to the statutory language and will show that the public convenience and necessity which the statute contemplates includes a reasonable protection to employees from the injurious effects of abandonments of rail lines. In this connection, we will call particular attention to the case of *United States vs. Lowden*, 308 U. S. 225, which established that employee protection was available under the similar language of Section 5(4) of the Interstate Commerce Act (as it existed prior to the recent amendment) by virtue of the authority there given to the Commission to impose just and reasonable conditions in the public interest in cases where authority was sought to effect consolidations of carriers. We will show that no reasonable distinction can be drawn between the public convenience and necessity and the public interest in this regard.

In the second place, we will examine a line of decisions by the Interstate Commerce Commission wherein conclusions were reached similar to that reached by it in the present case and contrary to the position of the appellees and the lower court. We will show that these decisions are not such as to be controlling upon the courts in this case.

Lastly, we will examine the history of the Interstate Commerce Act after the Commission's interpretation of Section 1(20) was announced, and will consider the significance to be attached to the fact that Congress has not since amended this section. In this connection, we will give particular attention to the legislative proceedings which preceded the enactment of the Transportation Act of 1940. We will show that there were no developments during this



period which can properly be considered as a legislative ratification of the Commission's construction of the statute.

Reduced to outline form, these contentions are as follows:

I. Public convenience and necessity in relation to the abandonment of rail lines includes a reasonable protection of the interests of employees.

II. The administrative interpretation given to Section 1(20) of the Interstate Commerce Act by the Interstate Commerce Commission is entitled to no weight in this case.

III. The Congress has never ratified the interpretation given by the Commission to Section 1(20) of the Interstate Commerce Act.

### **Argument**

#### **I. PUBLIC CONVENIENCE AND NECESSITY IN RELATION TO THE ABANDONMENT OF RAIL LINES INCLUDES A REASONABLE PROTECTION OF THE INTERESTS OF EMPLOYEES.**

The word "abandonment," as applied to railroad lines, raises a mental picture of a small railroad company struggling against hopeless economic odds and finally surrendering its franchise because of its inability to earn operating expenses. Only a small proportion of abandonment applications, however, present such a situation. Most of them are filed by comparatively large and prosperous companies who seek to rid themselves of unprofitable branches or secondary lines. This type of abandonment does not represent the economic demise of the applicant. Frequently, it does not even contemplate the withdrawal by it from transportation activities in the area served by the abandoned line, for in most instances, the applicant intends to continue to render service either by other rail lines or by motor buses or trucks operated by it or a subsidiary company.

Every abandonment, of course, must be justified by a showing that "the present or future public convenience and necessity permit of such abandonment." (Interstate Commerce Act, Section 1(18), U. S. C. Title 49, Section 1, Paragraph (18).) In cases where the abandonment of individual segments of large railroad systems has been permitted, this public convenience and necessity has been found in the fact that the discontinuance of the line will free an instrumentality of commerce from the unreasonable burden of its continued maintenance and operation. With this reasoning, we have no quarrel. We point out, however, that the public convenience and necessity are served in such instances only as the indirect result of strengthening the operating and financial position of the applicant, a corporation operated for private profit. Any improvement in the condition of such a corporation results, therefore, in a private benefit as well as a public one, and in fact, the former is considered as a necessary prerequisite to a realization of the latter.

While the private interests represented by railroad management are benefited by such abandonments, and through them, the public is also held to be benefited, there is another side of the picture. Those railroad employees who have found their employment on the abandoned line are undeniably harmed by its discontinuance. They may be deprived of employment altogether. Even if employment opportunities are found for them elsewhere, the acceptance of such opportunities is frequently at the expense of uprooted homes or the severance of life-long social and economic ties. Other railroad employees working on other lines of low traffic density which might conceivably be marked for abandonment cannot but feel that their own employment is unsure. If no policy is adopted whereby their interests may be accorded a reasonable protection, the result is necessarily a lowered morale among the skilled

workers upon whose services the railroad industry relies so heavily.

The Interstate Commerce Commission, therefore, has taken an illogical and inconsistent position. It recognizes that the private benefit to the railroad company results in the strengthening of the company as an operating unit and considers that the public is benefited thereby. It fails to recognize, however, that the weakening of the economic position of railroad employees, while a private detriment to them, reacts just as surely upon the public by lowering the operating efficiency of the men by whom transportation services are actually performed. This failure to accord due recognition to the public concern in the welfare of those who serve the nation's transportation system is the basis of the appellees' complaint in this case.

The conclusions just stated do not depend for their support upon abstract social theories alone. On the contrary, they are drawn directly from the opinion of this court in the case of *United States vs. Lowden, supra*. Inasmuch as the argument of the appellees relies rather heavily upon the cited case, it is desirable to examine in some detail the opinion and the statutory language upon which it is based.

The *Lowden* case construed Section 5(4) of the Interstate Commerce Act (as it read prior to the recent amendments incorporated by the Transportation Act of 1940) rather than Section 1(18-20). Section 5(4) and Section 1(18-20) of this Act, however, are (or were) analogous sections. Each was designed to require approval from the Interstate Commerce Commission as a prerequisite to certain proposed changes in the operations of carriers. Section 5(4) dealt with consolidations, while Section 1(18-20) deals with constructions and abandonments. Section 5(4) provided that the Commission's discretion was to be ex-

exercised according to the standard of "public interest," while Section 1(18-20) employs the phrase "public convenience and necessity." Section 5(4) provided that "if \* \* \* the Commission finds that, subject to such terms and conditions \* \* \* as it shall find to be just and reasonable, the proposed consolidation; \* \* \* will promote the public interest, it may enter an order approving and authorizing such consolidation, \* \* \* upon the terms and conditions \* \* \* so found to be just and reasonable." Section 1(20) (as above noted) contains the provision that "the Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, \* \* \* and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The most obvious and outstanding difference in language between these sections of the statute is to be found in the fact that Section 5(4) provided that the Commission might attach such conditions to an order issued thereunder as were "just and reasonable." It did not provide directly that the *conditions themselves* must be in the "public interest" but stated that if the Commission found that the proposed *consolidation* was in the public interest, it should approve "upon the terms and conditions \* \* \* found to be just and reasonable." Section 5(4) was therefore open to the possible interpretation that the Commission might impose conditions which were not related to the public interest, but which were nevertheless just and reasonable and germane to the subject matter of the transaction. Section 1(20) is not susceptible to such an interpretation as it provides specifically that any conditions imposed must be such as "the public convenience and necessity may require." If, therefore, it should develop that the decision of this Court in the *Lowden* case was predicated upon the

phrase "just and reasonable" in Section 5(4), a basis of distinction might be established between the two statutory provisions. If, however, it should appear that the Court disregarded the phrase "just and reasonable," assumed that all conditions imposed under Section 5(4) must accord with the standard of public interest, and still found that jurisdiction existed in the Commission to impose conditions for the protection of employees, then the omission of the phrase "just and reasonable" from Section 1(20) is unimportant, and the only significant distinction between the language of the two sections is that to be found from the use of the phrase "public convenience and necessity" in the one, and "public interest" in the other. An examination of the opinion will reveal that the Court in fact proceeded on the second of the two theories above noted. The language used by the Court leaves no doubt on this point. It stated the issue before it thus:

"Accepting the premise, as we may for present purposes, without considering the contention of the Commission that the conditions if just and reasonable, need not be related to the other statutory standards, the issue is narrowed to a single question whether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern." (*U. S. vs. Lowden*, 308 U. S. 225, 231.)

In considering the issue thus stated, the Court used the following language:

"The security holders are usually, though not always, favorably affected by economies resulting from consolidation. But the Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in



wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights, which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute." (P. 233.)

After calling attention to various efforts, both private and governmental, to improve the position and status of railroad employees in various connections, the Court continued:

"In the light of this record of practical experience and congressional legislation, we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve." (P. 238.)

Thus, the decision in the *Lowden* case is undoubtedly to the effect that the Commission had full authority under Section 5(4) to impose conditions in consolidation cases for the protection of employees as a matter of general public interest and not pursuant to any special authority conferred upon the Commission by that portion of the Sec-

tion which authorizes the imposition of "just and reasonable" conditions. In light of the language of this decision, therefore, the only possible argument now open to the appellants as a basis of distinction between Section 1(18-20) and Section 5(4) is that there is some fundamental difference between the public interest and the public convenience and necessity which distinguishes this case from the *Lowden* case. Such a contention is indeed raised in the briefs of the appellants. An examination, however, of the distinction which they claim will reveal that it has no valid basis.

Neither of the two phrases under consideration has a restricted or technical meaning. Both were introduced into the Interstate Commerce Act by amendments enacted as a portion of the Transportation Act of 1920. This statute marked a significant change in the history of federal railroad regulation, a change from a policy limited to the prevention of abuses and discriminatory rates to one contemplating the development of adequate transportation service. (*Akron, Canton & Youngstown Railway Company vs. United States*, 261 U. S. 184). This new policy was sought to be implemented by requiring approval by the Interstate Commerce Commission of many changes in operating practices theretofore subject to state regulation or left to the uncontrolled discretion of private management. Among the practices so regulated were those relating to the consolidation of carriers, the extension or abandonment of lines, the issuance of securities, the maintenance of interlocking directorates, and others. For each of these practices, the approval of the Commission was required. Standards were established according to which the discretion of that body should be exercised. These standards were "public interest" in the case of consolidations (Section 5(4)), the issuance of securities (Section 20a(2)), and interlock-

ing directorates (Section 20a(12)), while the standard of "public convenience and necessity" was established in the case of extensions and abandonments (Section 1(18-20)). Comparison should be made also with the standard of "interest of the public and \* \* \* advantage to the convenience and commerce of the people," which was established for Commission action by the Panama Canal Act (Interstate Commerce Act, Section 5(21)), and that of "interest of the public and the commerce of the people" set up by the Car Service Act (Interstate Commerce Act, Section 1(15)), two statutes which were passed just prior to the Transportation Act of 1920.

It is at once apparent that the standard of administrative action outlined by each of the quoted phrases is one which contemplates the exercise of a broad administrative discretion. Taken alone, no one of them evidences an intent to establish a basis of decision which must be applied with technical exactness. Throughout, the thought is clearly expressed that henceforth, the public welfare rather than private benefit is to control in relation to the operating practices of the railroads. Slight differences in the language whereby this thought is expressed cannot be held to create significant differences in meaning between standards so broadly and generally stated.

The conclusion above reached has received authoritative recognition by courts and commentators in relation to the meaning to be attached to the phrase "public convenience and necessity." Thus, Professor Sharfman, in his monumental work entitled "The Interstate Commerce Commission," makes the following statement:

"In the field of extensions and abandonments, which bears upon the problem of service as well as upon that of management, the usual procedural safeguards are provided, coupled, as in the matter of security issues, with a requirement of express notice

to the state authorities concerned; but the substantive power vested in the Commission confers, by its very terms, an almost unrestricted charter for the exercise of administrative discretion. The construction and operation of new lines, by way of extension or otherwise, and the abandonment of the whole or any portion of existing lines, or of their operation, are made dependent upon the issuance by the Commission of a certificate 'that the present or future public convenience and necessity require or will require' the new construction, extension or operation, or of a like certificate 'that the present or future public convenience and necessity' permit of the abandonment. No further guide to the required administrative action is provided. On the contrary, the discretionary character of the Commission's authority is accorded added recognition; for it is not only empowered to grant or deny the certificate as prayed for, but may issue it 'for a portion or portions' of the line of railroad embraced in the application, or 'for the partial exercise only of such right or privilege,' and it may attach to the issuance of the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.' And the Commission's authority to *order* the extension of lines and the acquisition of facilities, by way of exercise of positive power toward the provision of adequate service, likewise involves a large measure of administrative discretion. It is true that the Commission's action, which may result from a proceeding instituted on its own initiative, is conditioned upon findings, 'as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension of facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public'; but these limitations, in essence, but set up the usual standard of '*public interest*,' and thus leave the determination of concrete policy to the judgment of the administrative tribunal." (Vol. II, pp. 361-362.) (Emphasis supplied.)

The same thought was well expressed by one of the lower federal courts in the case of *Lancaster vs. Gulf, Colorado & Santa Fe Railway Company*, 298 Fed. 488, 491, when, in referring to Section 1(18) of the Interstate Commerce Act, it said:

"The purpose there expressed (is) to make the public good, rather than the competitive instinct of railroad companies the determining factor . . . ."

If some distinction exists between the public interest and the public convenience and necessity, what is the nature of that distinction? It will not suffice to say that the one embraces employee protection while the other does not, for this is a mere question-begging re-statement of the appellants' position. To establish the existence of the distinction which the appellants assert, it is necessary to show some fundamental difference in the thought expressed by the two phrases which gives rise to that distinction. So far, during the history of this case, appellants have been unable to point to such a fundamental difference, nor do we believe that they can do so. What factor is inherent in the public interest which is not also inherent in the public convenience and necessity? Would the Commission have a larger measure of administrative discretion in relation to abandonments if the standard for its decisions was expressed to be that of the public interest? Is it possible that a certain decision might be required by the public interest, yet not required by the public convenience and necessity? Is it conceivable that a proposed transaction might be considered as required by the public convenience and necessity, and yet be contrary to the public interest?

There is no magic in the phrase public convenience and necessity. It is merely the mode of expression which for many years has been used to characterize the interest of the public as related to the establishment, extension or abandon-



ment of public utilities. When Congress came to treat of these subjects in relation to the railroads, it naturally adopted a phraseology already applied in other fields.

Both the Commission and the courts have recognized the absence of any fundamental difference between the two phrases under consideration by using them interchangeably. Thus, in *Louisiana, Arkansas & Texas Railway Company Operation*, 170 I. C. C. 602, in a proceeding filed under Section 1(18-20), the Commission stated the issue before it thus:

"But in considering whether a certificate shall issue upon the application presented, we are called upon to consider not only the interest of the parties immediately concerned but the *general public interest* with due regard to other provisions and requirements of law." (Emphasis supplied.) (p. 606.)

The Supreme Court of the United States in a case involving an application for a certificate to permit construction of a new line filed under this same section, stated the purpose of the statutory provision thus:

"Undoubtedly the purpose of these provisions is to enable the Commission, *in the interest of the public*, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." (Emphasis supplied.) (*C. & O. R. Co. vs. U. S.*, 283 U. S. 35, 42.)

In the similar case of *Texas & New Orleans Railroad Company vs. North Side Belt Railroad Company*, 276 U. S. 479, the court made the following statement:

"The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the *public interest*."

See also *Atlantic Coast Line R. Co. vs. U. S.*, 284 U. S. 288, 295, where the court in several instances refers to the "public interest" as the controlling factor in cases filed under Section 1(18-20) of the Interstate Commerce Act.

These instances of the employment of the phrase "public interest" in connection with proceedings filed under Section 1(18-20) are not examples of a careless use of language. They constitute rather a recognition of the fact that, underlying *all* of the provisions of the Interstate Commerce Act, is a *single* governmental policy. Whether this policy be phrased in terms of "public interest" or "public convenience and necessity," is immaterial. The policy itself and the jurisdiction exercised by the Commission in effectuating it is basically the same.

By way of summary of the above, we have shown that the decision in *U. S. vs. Lowden* establishes that employee protection is a phase of the public interest which the Interstate Commerce Commission may appropriately consider in consolidation cases, and that no basis of distinction exists in principle between the scope of the public interest and that of the public convenience and necessity as applied to abandonments.

In addition to this identity in principle as between the applicable statutory provisions, there exists a high degree of similarity as to the practical results secured from consolidations and abandonments themselves. This fact is perhaps more relevant to the question of the extent to which jurisdiction should be exercised by the Commission in particular cases than it is to the question of the existence of the jurisdiction itself. However, the court's attention should be called to the fact that there is more in common between consolidations and abandonments than is apparent at first glance.

Every consolidation of railroads has within it the im-

plication of abandonments to come. Consolidations are economy measures. Usually the only way by which the anticipated economies can be realized is from the elimination of duplicate facilities. Such elimination is accomplished by the abandonment of the shops, offices, stations, yards or terminals of one or another of the consolidating roads.

Abandonments, on the other hand, do not necessarily mean the discontinuance of operations by the applicant in other sections of the country, or even in the area served by the line which is to be abandoned.

"Broadly speaking, applications for abandonments are of two principal types; those incidental to readjustments in plant and service; and those designed to relieve carriers of the burdens of unprofitable operation. The proceedings resulting from the first of these groups of applications can be disposed of very briefly. They are generally initiated for the purpose of increasing efficiency, effectuating economies, or promoting safety, and they contemplate no material diminution in the scope or quality of the service rendered to the patrons and communities involved."

. . . . .

"But in most instances carriers seek permission to abandon their lines, in whole or in part, because of the pressure of unprofitable operation; . . . ."

(The Interstate Commerce Commission, by Sharfman, Vol. III-A, pp. 331, 332).

Thus, the ultimate end sought in abandonment proceedings is an improvement in the business position of the applicant through the discontinuance of an unprofitable operation for which there may or may not be substituted another and more profitable one.

The practical consequences of consolidations and abandonments are therefore very similar, both in relation to the private parties directly concerned and in relation to the

public. Both seek to strengthen the carriers as transportation agencies and thus benefit the public. Both deprive workers of employment, impair employee morale, endanger labor relations, and thus harm the public. In regard to both, the means are available through systems of displacement allowances and the like whereby employees may be recompensed for their losses during the necessary period of readjustment. Thus, both in relation to consolidations and abandonments, it is possible to compensate labor for its losses out of the gains realized by capital. Where such a system of compensation is applied, the public ultimately secures the full benefit of an improved transportation agency without suffering the detriments which inevitably follow if corresponding losses are left to fall upon the employees alone.

It is, of course, possible that individual cases may arise where the resources of the applicant are so depleted that little or no provision can be made for employees. Such situations may surely be left for their solution to the discretion of the Commission. The existence of jurisdiction to act in a certain field does not imply that such jurisdiction must always be exercised, or always exercised in the same manner.

Accordingly, we conclude from the foregoing that there is no difference in principle between the language of Section 1(18-20) of the Interstate Commerce Act and that of Section 5(4) which can justify the conclusion that a less extensive jurisdiction was conferred upon the Commission by the one section than by the other, and further, that there is no practical difference in the results achieved by virtue of these provisions which can support the conclusion that the Commission is or should be denied a power in relation to abandonments which it possesses in relation to consolidations.

## II. THE ADMINISTRATIVE INTERPRETATION GIVEN TO SECTION 1(20) OF THE INTERSTATE COMMERCE ACT BY THE INTERSTATE COMMERCE COMMISSION IS ENTITLED TO NO WEIGHT IN THIS CASE.

It is true that the Interstate Commerce Commission in a series of decisions beginning in 1935 has disclaimed any authority in it to impose conditions for the protection of employees in abandonment cases. It is also true that the courts have held that an administrative interpretation of a statute is entitled to some weight when that statute comes before the courts for consideration. The amount of weight to be attached, however, varies according to the circumstances of individual cases.

Out of the vast number of reported decisions which might be cited in this connection, we have selected four from the reports of this court, not because of any fancied resemblance between their facts and the facts of the case at bar, but because of the legal principles which are there recognized. We direct the court's attention to the following quotations from the opinions in these cases. Citations in the course of the opinion have been omitted and emphasis has been supplied by us in each case:

"It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. But the court is not bound by a construction so established. *The rule does not apply in cases where the construction is not doubtful.*"

*United States vs. Missouri Pacific R. Co.*, 278

U. S. 269, 280.

"True indeed it is that administrative practice does not avail to overcome a statute *so plain in its commands as to leave nothing for construction.* True



it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

*Norwegian Nitrogen Prod. Co. vs. U. S.*, 288 U. S. 294, 315.

"There is thus a complete absence of those reasons which ordinarily lead courts to give persuasive force to an administrative construction and which justify their acceptance of it in preference to their own. The regulations have not been consistent in their interpretation of the statute and *do not embody the results of any specialized departmental knowledge or experience. No one, not even the government, will be prejudiced by its rejection*, and as we have said the construction flies in the face of the purposes of the statute and the plain meaning of its words. Judicial obeisance to administrative action cannot be pressed so far."

*Haggar Co. vs. Helvering*, 308 U. S. 389, 398.

"Some reliance is placed by appellant on departmental construction, but we may dismiss that contention with the observation that we do not consider the true construction as doubtful, and that the departmental construction referred to was neither contemporaneous nor continuous."

*Wisconsin Central R. Co. vs. U. S.*, 164 U. S. 190, 205.

It is apparent from the above cited cases that the rule regarding the weight to be attached to administrative interpretations of statutes is not a technical one which must be slavishly or uniformly followed in all cases. The rule arises

out of certain practical considerations of which the courts have availed themselves when called upon to interpret statutes. These considerations have greater or less significance depending upon the circumstances of the individual case.

An analysis of the opinions quoted above reveals a number of significant factors. The rule "does not apply in cases where the construction is not doubtful." (*U. S. vs. Missouri Pacific R. Co.*) It applies with lesser force if the administrative decisions in question "do not embody the results of any specialized departmental knowledge or experience." (*Haggar Co. vs. Helvering.*) It has "peculiar weight when it involves a contemporaneous construction of a statute." (*Norwegian Nitrogen Products Company vs. U. S.*) It is entitled to greater or less respect depending upon whether the administrative interpretation has or has not been "continuous." (*Wisconsin Central R. Co. vs. U. S.*) It is of lesser significance where "no one . . . will be prejudiced" by the rejection of the administrative ruling. (*Haggar Company vs. Helvering.*)

An examination of the language of the Commission's decisions interpreting Section 1(18-20) of the Interstate Commerce Act with relation to its jurisdiction to impose conditions for the protection of employees and an examination of the facts surrounding such decisions will reveal that the Commission's interpretation (a) was erroneous in the first instance; (b) dealt with a subject outside the sphere of the Commission's technical knowledge; (c) was not contemporaneous with the enactment of the statutory provision; (d) has not continued over a substantial period of time; (e) is not such that its rejection at this time will damage anyone.

In the ensuing discussion, we wish to consider the above factors in the order named.

(a) **The Commission's Interpretation was Erroneous in the First Instance**

This question requires no extended discussion here, as in effect it supplied the subject matter of the entire first section of this brief. We wish to supplement our previous discussion, however, by pointing out more particularly the exact error into which the Commission fell.

Its conclusion that it had no jurisdiction to impose conditions for the protection of employees under Section 1(20) of the Interstate Commerce Act was first announced in the case of *Chicago Great Western Railway Company Trackage*, 207 I. C. C. 315. In its opinion, after referring to an earlier case (*St. Paul Bridge and Terminal Railway Company Control*, 199 I. C. C. 598) wherein it had considered the effect of the applicants' proposal upon employees as being a matter of "public interest," the Commission held as follows:

"The present proceeding differs from that one in that it is brought under the provisions of Section 1(18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in Section 5(4) proceedings we are of the view that under Section 1(20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from Section 5(4) and read into Section 1(20) the power to impose such terms and conditions as we may find to be *just and reasonable*. Our sympathy for employees and full realization of the hardship that may and often does result to them in the administration of the abandonment and other provisions of Section 1(18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity." (Pp. 322-3.) (Emphasis supplied.)

At the time when this decision was rendered, the Commission had never imposed upon an order issued under Section 5(4) any really comprehensive conditions for employee protection.\* In the tentative steps it had made in that direction, it had found support for its position in the inclusion of the phrase "just and reasonable" in that section of the statute. From the above quoted excerpt, it is obvious that the Commission viewed this language as being of supreme significance in relation to its jurisdiction under Section 5(4), and considered that its omission from Section 1(20) constituted a conclusive obstacle to the exertion of any similar authority under the latter section.

As already pointed out, however, this court did not predicate its decision in *U. S. vs. Lowden* upon any distinctive phraseology in Section 5(4) as constituting evidence of Congressional intent, but rather upon the more basic ground that the public interest contemplated a rea-

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\* In the case of "*In the Matter of Consolidations of Railroads*," 185 I. C. C. 403, 427, the Commission urged upon carriers contemplating consolidations that they give consideration to the question of employees' interests, and stated that the Commission itself would consider the imposition of appropriate conditions even though at the same time it expressed some doubt as to its jurisdiction to do so.

In the case of "*Unification of Lines in Southern New Jersey*," 193 I. C. C. 183, the Commission declined to impose conditions for the protection of employees on the ground that the facts of the case did not warrant it.

It did impose conditions for employee protection in the case of "*St. Paul Bridge and Terminal Railway Company Control*," *supra*, but only to the extent that separate seniority rosters be maintained.

In "*Associated Railways Company Acquisition and Securities*," 228 I. C. C. 277, the Commission rejected the application entirely and stated as one ground among many others that employees would be injuriously affected.

It was not until the case of "*Chicago, Rock Island and Gulf Railway Company Trustees' Lease*," 230 I. C. C. 181, and 233 I. C. C. 21, that the Commission considered the question at length, definitely held that it had jurisdiction under Section 5(4) to impose conditions for the protection of employees, and actually did impose such conditions comprehensive in scope. This is the case which later came before this court under the title of *U. S. vs. Lowden*. Even in this case, four members of the Commission dissented on this point, and one Commissioner, in a concurring opinion, expressed doubt as to the Commission's jurisdiction.

These are the only cases of which we are aware which considered the question of the Commission's authority to impose conditions for the protection of employees under Section 5(4), prior to the decision of the *United States vs. Lowden*. It will be noted that only the first two of these cases had been decided by the Commission when the case of *Chicago Great Western Trackage* was before that body.

sonable protection of employees who might be injured as a result of the effectuation of the public policy which was expressed in the Act. The decision of the Commission in *Chicago Great Western Railway Company Trackage* was obviously based upon a directly opposite premise and was therefore clearly erroneous. It sought to elevate to a position of false importance a minor difference in phraseology between these two sections. That the difference was in fact minor is apparent. Any authority to impose conditions, or to enter any order, granted to the Interstate Commerce Commission or any other administrative agency is necessarily limited by the requirement that it be exercised in a "just and reasonable" manner. This proviso is present by implication in all portions of the Interstate Commerce Act and other statutes. The fact that it was expressed in terms in Section 5(4) and not in Section 1(20) does not establish any valid difference in meaning between the two sections. The Commission, however, assumed such a distinction and upon it predicated its decision in the *Chicago Great Western* case.

At no time, either before or since the decision in *U. S. vs. Lowden*, has the Commission ever seen fit to reconsider the reasoning upon which it based its original decision. In all subsequent cases, it has contented itself by merely citing the *Chicago Great Western* case. Hence, it may be fairly said that the language of this opinion as above quoted represents the only effort ever made by the Commission to rationalize its position.

We conclude from all of the foregoing that the cases wherein the Commission has construed Section 1(20) in regard to the extent of the jurisdiction conferred are clearly erroneous. An administrative interpretation which is contrary to the express terms of an unambiguous statute is entitled to no weight when the statute comes before the courts for construction.



**(b) The Commission's Interpretation Dealt with a Subject Outside the Sphere of Its Technical Knowledge**

Administrative boards and commissions are established because the specialized knowledge of their members is considered essential to the proper administration of statutes operating in complicated fields. Where such bodies make interpretations of the provisions of the statutes under which they function in relation to the technical questions which arise, their decisions have been accorded a relatively high degree of respect.

The question here involved has no such technical aspect. The concept "public convenience and necessity" is not one which is peculiar to the Interstate Commerce Act or to the transportation field. It is one which is familiar in all public utility law. The question of the interpretation to be given to that phrase is therefore one of general law. It is not one where a lay board such as the Interstate Commerce Commission has any inherent advantage growing out of the departmental skill or specialized knowledge of its members. The advantage is rather with the courts whose traditional function it is to interpret the general terms of general statutes.

It follows, therefore, that the decision of the Interstate Commerce Commission that employees' interests are unrelated to the public convenience and necessity is a decision on a matter entirely outside the field of the administrative expertness of that body, and is entitled to relatively little weight in the courts.

**(c) The Commission's Interpretation Was Not Contemporaneous with the Enactment of the Statutory Provision**

Administrative officials are likely to be closely attuned to situations, problems and purposes which bring about the

enactment of statutes within the field of their specialization, even sometimes to the extent that they actually participate in the drafting of proposed legislation. Their interpretations when made in the early stages of the application of the law thus frequently spring from the same forces which prompted its enactment so that legislation and interpretation constitute in fact one continuous process. When administrative constructions are given under such circumstances they shed valuable light on the probable intent of the legislature. Where, however, the interpretation in question is first uttered long after the passage of the statute, this factor is not operative and the administrative ruling is entitled to no peculiar respect in this regard.

As applied to the facts of this case, we find that, as noted above, Section 1(18-20) formed a part of the Transportation Act of 1920. The Commission's interpretation of the language of this section as stated in the case of *Chicago Great Western Trackage, supra*, was not made until 1935. The doctrine of that case was not applied to the abandonments of railroads until 1936. Thus, the decisions of the Commission were not made until many years after the statute was enacted, and throw little or no light upon the question of the probable intention of its framers.

**(d) The Commission's Interpretation Has Not Continued Over a Substantial Period of Time**

Where an administrative ruling interpreting a statute has existed for a comparatively long time without challenge, a natural presumption arises to the effect that it must accord with the meaning of the statute and the understanding of the parties personally interested in its application. This factor, however, like all the others involved in the present phase of the discussion, must be cautiously applied in light of all the facts and surrounding circumstances. In the

present case, the relevant facts surrounding the period during which the Commission's interpretation has prevailed, are, in chronological order, as follows:

- 1935—Decision of the I. C. C. in the case of *Chicago Great Western Railway Company Trackage*—first announcement of the doctrine that Section 1(20) does not confer jurisdiction to impose conditions for the protection of employees.
- 1936—Decision of the Commission in *Delaware River Ferry Company of New Jersey Abandonment*, 212 I. C. C. 580—first application to abandonments of the rule stated in *Chicago Great Western* case.
- 1938—Decision of Division 4 of the Commission in the case of *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 230 I. C. C. 181—first case attaching comprehensive conditions to an order issued relative to a consolidation consummated under Section 5(4) of the Interstate Commerce Act.
- 1939—(April 3) Decision of Division 4 affirmed by the full Commission, *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 233 I. C. C. 21.
- 1939—(July 31) Decree of U. S. Dist. Ct., N. D. Ill., setting aside order of I. C. C. in *Chicago, Rock Island and Gulf* case. *Lowden vs. U. S.*, 29 Fed. Supp. 9.
- 1939—(Dec. 4) Decision of the Supreme Court in the case of *U. S. vs. Lowden* reversing the decree of the District Court in *Lowden vs. U. S.*, and sustaining the decision of the I. C. C. in the *Chicago, Rock Island and Gulf* case.
- 1940—(Aug. 28) Decision of the I. C. C. in the present case rendered. *Pacific Electric Railroad Company Abandonment*, 242 I. C. C. 9.
- 1940—(Nov. 8) This action was filed. (R. 1.)

From the above, it appears that the administrative ruling which is here challenged has prevailed for slightly more than five years. During one-half of that time, another

case was pending before the Commission and the courts involving a similar issue. Had a decision been rendered in that case contrary to that which was eventually reached, it would have effectively foreclosed the appellees from in any way contesting the Commission's interpretation of Section 1(20) as announced in the case of *Chicago Great Western Railroad Company Trackage*, and subsequent cases. Hence, although the appellants are able to cite an impressive number of cases wherein their present position was stated these cases were actually concentrated in a relatively short period of time, during only a small fraction of which was any practical opportunity of protest afforded to the employees. As soon as such opportunity presented itself, protest was made and prosecuted diligently.

Thus, the interpretation reached by the Interstate Commerce Commission is not entitled to any presumption of correctness on account of any claim that it has long continued in effect without objection by the parties.

**(e) The Commission's Interpretation Is Not Such That Its Rejection at This Time Will Damage Anyone.**

Where a statute imposes upon individuals certain obligations with which they must comply at their peril, and they do comply with those obligations as they are interpreted by administrative authorities, there is, of course, sound reason why the courts should be reluctant to reverse such an interpretation. This, however, is not the situation here.

Section 1(20) imposes no general duties upon all carriers. It becomes operative only after an application for a certificate of public convenience and necessity is filed and establishes the *criteria* by which such an application is to be judged. It is apparent, therefore, that the rejection of the existing interpretation of this section heretofore adopted by the Commission cannot be effective to alter the status of

carriers generally. Certainly those which have filed no application for a certificate cannot be affected by any change in construction.

Furthermore, it is improbable that any carrier who has already filed such an application and whose application has been granted without conditions looking to employee protection will be deprived of any substantial legal right. Certainly no such conditions can be attached to a transaction already consummated without at least a reopening and rehearing of the case before the Commission. At such a hearing, the Commission would undoubtedly have discretionary power to impose or refuse to impose conditions in light of all the facts of the particular case. Surely the judgment of the Commission could be relied upon to prevent any substantial injuries which might arise because of a changed interpretation of the statute.

Furthermore, in this connection, it should be observed that the aim of Section 1(18-20) was, in part at least, to confer upon the railroads a *benefit* through enabling them to divest themselves of the obligation to continue unprofitable operations no longer required by the general public convenience and necessity but which had in many instances been required by the laws of the various states. A discretionary power vested in the Commission, which would enable that body under proper circumstances to require those carriers seeking the benefits of the Act to share a portion of their anticipated gains with the employees injured, cannot be said, therefore, to deprive the railroads of any property right. At most, it would constitute a diminution of the benefit which the statute itself affords. Surely no railroad company can be heard to complain merely because the gains which it derives from an abandonment turn out to be less than it had originally anticipated, particularly if the



diminution of benefits enjoyed was shown to be required by the public convenience and necessity.

Hence, we conclude that there is no one in a position to suffer serious damage by a change in his legal status if the Commission's interpretation of Section 1(20) is now rejected.

### Summary

From all of the foregoing, we conclude that the Commission's interpretation of the extent of its authority under Section 1(20) of the Interstate Commerce Act is in no sense binding upon this court, (a) because it is based on an obviously erroneous construction of the statute; (b) because it is not a decision of a technical point in a specialized field where the Commission may be presumed to be peculiarly competent, but is rather a decision of a general issue of law within the province of the courts; (c) because the Commission's interpretation was not contemporaneous with the enactment of the statute, but was issued 15 years thereafter; (d) because this interpretation has not existed for a long period during which opportunity was available for attacking it, and (e) because no one can be now relying upon this section as establishing presently existing rights and no one can be injured if this interpretation is now rejected.

### III. THE CONGRESS HAS NEVER RATIFIED THE INTERPRETATION GIVEN BY THE COMMISSION TO SECTION 1(20) OF THE INTERSTATE COMMERCE ACT.

The appellants advance yet another argument in support of their position. Like that discussed in the preceding section, it is derived from the administrative interpretation placed upon Section 1(20) of the Interstate Commerce Act by the Commission, but seeks to attach further significance

to that interpretation because of the fact that Congress has not amended this section since the Commission's ruling was announced.

It is unquestionably true that under proper circumstances, Congressional silence may amount to a ratification of an administrative ruling and the courts have so held. The doctrine at most, however, is one of presumption. If the legislature knows of such a ruling or must be presumed to know of it because of its long continuance and nevertheless fails to alter the statute, then the interpretation in question is assumed to have been in accord with the original legislative intent.

Obviously this doctrine of legislative ratification of an administrative construction of a statute is subject to many of the same limitations as discussed above. Thus, the administrative interpretation must not be obviously erroneous if the doctrine is to apply and it will apply with lesser force if the interpretation is not contemporaneous nor long continued, nor within the technical field with which the administrative tribunal is familiar, nor if its rejection will have no injurious effects upon private interests.

The doctrine is definitely one of limited applicability. In addition to the limitations noted above it is subject to further limitations peculiar to itself. As was well stated by one of the lower federal courts in the case of *F. W. Woolworth Company vs. U. S.*, 91 Fed. 2d 973, 976:

"But not every ruling is incorporated in the text because it is not repudiated; no one has ever suggested anything of the sort."

and further:

"To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; \* \* \*"

Thus, mere Congressional inaction does not necessarily place the stamp of legislative approval upon all administrative rulings. Something further is needed to establish a tangible basis for a presumption of legislative ratification. The appellants claim to find such additional factors in certain reports which were made to Congress by the Interstate Commerce Commission regarding its jurisdiction to protect employees, upon which Congress took no action, and in the deliberations and legislative proceedings surrounding the enactment of the Transportation Act of 1940.

It is true that in both its 49th and 50th Annual Reports (1935 and 1936) the Interstate Commerce Commission expressed doubts as to the extent of its jurisdiction to protect employees from the injurious consequences of certain transactions which it was authorized to approve or disapprove. It will be noted, however, that these reports related *both to abandonments and to consolidations or unifications of carriers*.<sup>\*</sup> They therefore referred as much to Section 5(4) of the Act as to Section 1(20). As to Section 5(4), they related to the jurisdictional doubts which the Commission entertained regarding this section up to the time of the decision in *U. S. vs. Lowden*. Congressional in-

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\* The text of the 49th Annual Report as to this point reads as follows:

"In proceedings under provisions of the interstate commerce act we issue certificates of public convenience and necessity authorizing railway common carriers to abandon existing facilities, or to unify their railway properties or operations. It follows as a consequence of such *abandonments or unifications* that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. An instance in which such consequence resulted from the use by one carrier of certain facilities of another, jointly with the latter, is given in our report in *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315. In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. This refers particularly to relocation or abandonment of shops. We recommend further statutory provisions to protect employees from undue financial loss as a consequence of authorized railway *abandonments or unifications* found to be in the interest of the general public, or otherwise lawfully effected." (Emphasis supplied.)

action over the next five years as to both subjects mentioned in these reports was therefore as potent an argument to disprove the Commission's jurisdiction to protect employees in relation to consolidations as in relation to abandonments. In fact, these very reports are referred to in support of the dissenting opinion of four commissioners in *Chicago Rock Island and Gulf Railway Company Trustees' Lease*, 233 I. C. C. 21, 28, and in support of the decision of the District Court in *Lowden vs. U. S.*, 29 Fed. Supp. 9, 13. This argument was not considered controlling by this court when the case of *U. S. vs. Lowden* was before it for consideration and no reason is seen why it should be given greater weight here.

During the period 1936 to 1939 while Congress amended various sections of the Interstate Commerce Act, a long and complicated statute, it did not give consideration to the question of the protection of employees adversely affected by either abandonments or consolidations. During the year last mentioned, however, a comprehensive measure was introduced as an amendment to the Interstate Commerce Act which was later enacted in modified form as the Transportation Act of 1940. This Act made further provision for the protection of employees affected by consolidations authorized under Section 5 but made no change in the language of Section 1(20). The appellants argue from this fact that the general question of employee protection was in the mind of Congress, and that that body must also have had in mind protection of employees injuriously affected by abandonments. From this conclusion, it reasons that Congress must have known the nature of the Commission's decisions regarding its jurisdiction under Section 1(20) and must have intended to confirm those decisions. The legislative history of the Act, however, fails to support this conclusion.

We will show below that the purpose of Congress was such that the protection of employees injuriously affected by consolidations of railroads was a necessary and integral part of that purpose, while a similar protection in relation to abandonments was entirely foreign thereto. We will also show that such references to the abandonment question as may be found in the legislative history do not establish that Congress had any knowledge of the controversy which was then in progress in relation to the extent of the Commission's *jurisdiction* under Section 1(20), and that the subsequently enacted legislation has no proper bearing on this controversy.

*Transportation Act  
Developed from  
Committee of Six  
Report.*

The Transportation Act of 1940 developed from a bill known as S. 2009. This bill was based upon the recommendations of two committees, the Committee of Three, and to a larger extent, the Committee of Six. The facts in this connection are set forth in the following excerpt from the Report of the Committee on Interstate Commerce of the United States Senate as presented by Chairman Wheeler of that Committee:

"In 1938 President Roosevelt appointed a special committee to study the railroad problem. That committee, composed of Commissioners Splawn, Eastman, and Mahaffie of the Interstate Commerce Commission, and unofficially designated as the Committee of Three, made certain definite recommendations. They urged, among other things, the creation of a transportation board. They likewise recommended the regulation of water carriers by a central regulatory body. This recommendation was one which President Roosevelt, in his message to Congress on June 7, 1935, had made and one which the Federal Coordinator of Transportation, as well as the Interstate Commerce Commission in its annual reports to Congress, had endorsed.



"On September 23, 1938, President Roosevelt appointed another special committee, this one known as the President's Committee of Six, to further study the railroad problem and to make recommendations. On December 23, 1938, this Committee of Six, composed of three representatives of railroad management and three representatives of railroad labor, reported its analysis and its proposed solution for the railroad problem.

"The recommendations of the President's Committee of Three and the recommendations of the President's Committee of Six, and a careful consideration of the public interest constituted the basis upon which the bill, S. 2009, was drafted and introduced." (Report of the Committee on Interstate Commerce of the United States Senate, Report No. 433, 76th Congress, First Session, pp. 1 and 2.)\*

*Nature of*

*Transportation*

*Problem.*

More important than the knowledge of the identity of the various bodies who contributed in their turn to this legislation is an accurate understanding of the

nature of the problem which they were endeavoring to solve. This problem is clearly analyzed in the report of the Senate Committee on Interstate Commerce above referred to. We quote from the Report:

"The bill, S. 2009, represents a sound, realistic, and carefully considered approach to the solution of one of the most grave problems which confronts the people and the Congress of the United States. The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this Nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos. With one-third of the railroad mileage already in bankruptcy or receiver-

\* Although the Committee on Interstate and Foreign Commerce of the House of Representatives recommended drastic amendments to S. 2009, the statement of the origin of the legislation in the Committee's report is almost identical with that contained in the Report of the Senate Committee. See Report of Committee on Interstate and Foreign Commerce of the House of Representatives, 76th Congress, First Session, Report No. 1217, pp. 1 and 2.

ship courts and with another third tottering on the verge of bankruptcy, action must be taken to preserve not only the railroads but an adequate transportation system for this country. \* \* \* (P. 1.)

"For many years it has been the view of keen students of the transportation problem that there has been no consistent national policy with respect thereto. One reason urged in support of that view is that while the principal haulers of traffic and passengers, the railroads, have long been strictly regulated—as have, since 1935, motor trucks and busses engaged in interstate transportation—other forms of transportation are developed at public expense and without supervisory regulation. The net result of such a policy is inequality between various forms of transportation. As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this. It has also been urged, and it seems sound, that there is no equality in treatment when the railroads, and lately the motor vehicles, are strictly regulated, and other forms of transportation are regulated, if at all, to a much lesser extent." (Pp. 2 and 3, Report of the Committee on Interstate Commerce of the U. S. Senate, Report No. 483, 76th Congress, First Session.)

The Committee of Three had considered these problems in a general way and had made some recommendations of a specific nature.\* These, however, were not acted on by Congress and it remained for the Committee of Six to sketch the details of the policy which was later adopted in a large measure by the Congress as the Transportation Act of 1940.

The composition of the membership of the Committee of Six is highly significant for the purpose of our present inquiry. As pointed out above, three of its members were selected from the ranks of railroad management and three from those of railroad labor. They were assembled to cooperate in an effort to benefit the industry upon which both wings of the Committee depended for their support. It is of vital importance to note that they were *not there to adjust controversies between themselves*. Their purpose was rather to formulate a plan for the rehabilitation of the railroad industry, a plan from which *all elements involving controversies between labor and management would be eliminated in order that both parties might give it unreserved support*.

Accordingly, no controverted question of labor relations was considered by the Committee. In its report issued December 23, 1938, the Committee stated as follows:

"Your committee has carefully considered many suggestions and recommendations which have come to us from various sources. We have also considered proposals advocated by railway management and the labor organizations having to do with labor relations, but laid them aside believing that they are in the main problems to be worked out to the extent possible in joint conference by these interests

\* The recommendations of the Committee of Three are available in a document entitled "Immediate Relief for Railroads, a Message from the President of the United States Transmitting his Recommendations for Means of Immediate Relief for Railroads," and printed as House Document No. 583, 75th Congress, Third Session.

through collective bargaining, and if no solution can be found they may be urged upon the government or otherwise handled as the circumstances may appear to warrant."\*

See also in this connection the testimony of Mr. George M. Harrison, at that time President of the Railway Labor Executives' Association, and one of the members of the Committee of Six, as presented before the House Committee:

"The railroads wanted to talk with us about amending the Railway Labor Act. We wanted to talk with them about a 6-hour day and we realized that if the members of the committee got to discussing, quarreling about those matters we would forget the job we were assigned to do and that job was to do something about the transportation industry." (House Hearings, p. 227.)

As far as the general question of consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. Under the Transportation Act of 1920, an attempt had been made to direct the consolidation of railroads into a limited number of systems as prearranged by the Interstate Commerce Commission. This plan had proved a failure and it was the consensus of opinion that it should be abandoned. In fact, in the Report of the Committee on Interstate Commerce of the United States Senate above mentioned, it is stated that "the elimination of the requirement for such a (consolidation) plan" is "one of the primary purposes in the bill, so far as consolidations, etc., are concerned." (P. 31.)

\* The report of Committee of Six is reprinted on pp. 257-308 of the House Hearings. The quoted excerpt may be found on p. 277.

In referring to the "House Hearings" and the "Senate Hearings" respectively, may we be understood as having reference to documents entitled "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Congress, First Session, on H. R. 2531 and H. R. 4862," and "Hearings before the Committee on Interstate Commerce, United States Senate, 76th Congress, First Session, on S. 1310, S. 2016, S. 1869, and S. 2009."

Furthermore, it was apparently conceded on all sides that economies could be brought about through consolidations of rail carriers, and that those economies would be principally realized at the expense of railroad labor. At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case, because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Job Protection Agreement in May, 1936. This Agreement (reproduced at pp. 231-41, House Hearings) provided in essence for a system of allowances payable over a stated period to employees affected adversely by railroad consolidations.

Accordingly, there was no controversy between the members of the Committee as to the question of the protection of employees in consolidation cases, and the Committee could recommend as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction "shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the \* \* \* employees." (P. 275, House Hearings.) It must be remembered that when the Committee made this recommendation, however, it merely advocated the doing of what the employee organizations and 85 per cent of the railroads had already done through the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated as follows:

"Now, the existing situation is this: In 1936 in the spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might



be affected by coordinations or mergers. That agreement has now been in operation for about 3 years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come in to the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

"Now, the exact formula of that, of course, I am not here prepared to suggest, but at least we have solved that problem through collective bargaining with management and if we could get all of the roads into the agreement we would not even suggest any protection as a matter of law." (Pp. 216-17, House Hearings.)

Mr. Carl R. Gray, one of the carrier members of the Committee of Six, was evidently of the same opinion, for in his testimony before this same Committee, the following statements were made:

"Mr. Youngdahl: Have you any suggestions as to what might be done for the men under consolidations?

"Mr. Gray: Yes. We have had no difficulties in handling that separability with the men.

"Mr. Youngdahl: You refer to your ability to furnish jobs?

"Mr. Gray: We have a basis of compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination." (House Hearings, pp. 193-4.)

S. 2009, both in the form in which it was adopted by the Senate and in the amended form in which it was favorably reported by the House Committee, directs the Interstate Commerce Commission to require as a prerequisite to its approval of any proposed consolidation action "a fair and equitable arrangement to protect the interests of employees affected." By incorporating this language into the statute, the Congress adopted the attitude of the Committee, i.e., that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

From the foregoing discussion, it appears that the question of the protection of employees adversely affected by consolidations was definitely a part of the subject matter of this legislation from its inception. It was one which came within the scope of the deliberations of the Committee of Six and found a place in its report. It was intimately related to the purpose of the legislation because the removal of outworn restrictions on consolidations of rail carriers was in line with the basic legislative purpose of equal regulation for all carriers. Such a removal of restrictions necessarily presented the question of the effects of the anticipated consolidations upon employees. The fact that such a consideration gave rise to a positive enactment on the question is easily understood.

The fact that this court had decided the case of *United States vs. Lowden*, *supra*, holding that the desired protection was already available at the discretion of the Interstate Commerce Commission, does not militate against this conclusion. The Senate had passed S. 2009 and the House also had passed an amended form thereof at the time when *United States vs. Lowden* was decided, although the final form which the bill would take was dependent upon the agreement of the Houses through conference committee.

This court had this to say regarding the significance of the provisions in these bills:

"We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Section 5(4) (b) by making the practice *mandatory instead of discretionary*, as it had been under the earlier act." (Emphasis supplied.) (P. 239.)

Thus, in the opinion of this court, the Congress by passing the Transportation Act merely cemented a policy already recognized as affording a basis for the exercise of the discretion of the Interstate Commerce Commission. This action was taken by it "in its stride" in the course of the enactment of a far-reaching piece of transportation legislation dealing with many other problems.

*Reasons for  
Congressional Action  
In Consolidation  
Cases Did Not Apply  
In Relation to  
Abandonments.*

The question of abandonment and the protection of employees therein has no such complete legislative history. Apparently it has been felt by many that a facilitation of consolidations by rail carriers is a policy likely to strengthen the industry. No corresponding idea appears to have been expressed in connection with abandonments. The general question was not considered by either the Committee of Three or the Committee of Six. As far as the protection of employees affected by abandonments is concerned, the Committee of Six had no suggestion to make. The reason is not hard to find. The Washington Job Protection Agreement does not cover cases of abandonment. The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management and railroad labor. It was one of those questions of "labor relations" which, as stated by the Commit-

tee of Six in its report, found no place in its recommendations. Thus, when these recommendations were presented to Congress, the abandonment issue was not raised or called to the attention of that body.

In support of this position, we refer the court to the testimony of Mr. Harrison before the House Committee where, on page 244 of the report of its hearings, he stated as follows:

“Now, there is one matter I want to call your attention to; which is important.

“Just how we will take care of it I don't know, but at least I want to have it before you.

“The Chairman: Is that on the same question?

“Mr. Harrison: It is on the same question. The agreement does not cover instances where parts of railroads are abandoned.

“We sought to get the protection extended in those cases, but the carriers declined to agree with the organizations to afford protection in instances of abandonments.

“Now, if the Government should intervene through its powers and undertake to bring about abandonments, of course, that is a new situation for us and we think it would be fair if governmental assistance was brought into the abandonments of properties, that the Government should then provide for protection in those instances.

“Now, I realize I am skating on thin ice and I do not want to be in any position of bad faith with our employers, because we have this agreement and if it is not satisfactory the burden is on us to change it. I would like to have an opportunity to talk that matter out with our employers before I should make any definite request upon the committee in that direction. I think we owe that to them to talk to them about it.” (House Hearings, p. 244.)

Mr. Harrison stated clearly therefore that the protection of employees in abandonment cases was not a matter upon which the Committee of Six had made any recom-

mendation for the reason that the two groups represented on the Committee were not in agreement on the point. He recognized that the question of the facilitation of abandonments was one which was as yet outside the scope of federal policy, but said that "if the Government should intervene through its powers and undertake to *bring about abandonments*, of course that is a *new situation* for us, and we think it would be fair, if *governmental assistance was brought into the abandonments of properties*, that the government should then provide for protection in those instances."

By way of summary of our discussion to this point, we have seen that the governmental policy ultimately expressed in the Transportation Act of 1940 was one of removing restrictive regulations imposed upon the railroads when they enjoyed a transportation monopoly, but no longer desirable or fair in a day of keen competition between them and other transportation agencies not so regulated. As a natural expression of this policy, governmental restrictions on the consolidations of rail carriers were relaxed. As a natural result of this step, Congress legislated to protect employees affected by such consolidations and adopted a standard of protection agreed to generally by the bulk of the carriers and the employees in the railroad industry.

Abandonments, however, were entirely aside from that governmental policy which was made operative by the Act. No one suggested any substantial change in the abandonment provisions as a means of equalizing regulation among types of carriers and no such change was made. Accordingly, the logic of events did not present to the Congress any question of the effect of abandonments upon employees. The Committee of Six did not bring the matter before the legislators because the Committee itself was not in agree-

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\* Emphasis in this quotation has been supplied. We have also taken some liberties with the punctuation for the reason that the official record obviously does not bring out the sense of the witness' testimony.



ment, and the point was considered by it to be outside the scope of its activities. The question of abandonments was entirely foreign to the main current of congressional deliberation set in motion by the sponsors of this legislation, and there was nothing connected with this current which would serve to draw congressional attention to a consideration of the effect of such abandonments upon employees or to the adequacy of existing law.

It remains to be seen, however, whether the question of employee protection in abandonments was introduced into the legislative current from other sources in such manner as to focus congressional attention upon it. Without proof that such attention was bestowed, no presumption can be raised from congressional silence.

We wish to consider in this connection the testimony of one witness at the Senate Hearings and the significance of two amendments and a bill presented in the House of Representatives.

*The McGrath Testimony* The record of the hearings conducted by the Committees of the House and Senate consists of over 2500 printed pages. The only substantial reference to the question of railroad abandonments which either we or opposing counsel have been able to find (with the exception of Mr. Harrison's statement above noted) is contained in the testimony of Mr. Tom J. McGrath, who appeared as the representative of the Brotherhood of Railroad Trainmen. Mr. McGrath's references to this question are limited to three pages in the Senate Hearings, pages 402-4, inc.

The Interstate Commerce Commission in its brief has indulged in an extended analysis of this testimony in an effort to establish that Mr. McGrath and Chairman Wheeler of the Committee discussed the question of the desirability of vesting in the Commission a *discretionary* power to pro-

tect employees adversely affected by railroad abandonments, a power similar to that whose existence is here asserted by the appellants. Selected passages from this testimony have been quoted in support of this conclusion. A critical analysis of the record, however, fails to sustain the position taken by the Commission in its brief.

The original bill S. 2009 which was being considered by the Committee, contained the following provisions:

"In passing upon any proposed transaction under the provisions of this section, the Commission shall give weight to the following considerations, among others, . . .

"(4) the interest of the carrier employees affected"—

"The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

Mr. McGrath's objection to this language was stated by him as follows:

"If there is going to be a provision in the law which makes it mandatory upon the Commission to consider the interests of the employees, there should be something more concrete than that and something of a different nature." (Senate Hearings, p. 400.)

In reply to a comment to the effect that Congress should not be expected to particularize as to such a matter in the course of legislation, Mr. McGrath reminded the Committee that a provision had been written into the Emergency Transportation Act of 1933 to the effect that "men should not be discharged as a result of coordinations, but that they should be absorbed, and that natural attrition and normal attrition should take care of the reduction of the force;" (p. 400) and stated a little later that "the provisions of the 1933 act are better and more equitable and

surer" than those contained in the suggested bill (p. 401); and that "you asked me what I would suggest as being preferable to this; and I have given that to you." (p. 401) On p. 402, of this record, Mr. McGrath is further reported as saying that if men are entitled to protection against loss of jobs in cases of consolidations and mergers, as he was contending, "the same thing is true with respect to abandonments." (Appendix A, p. 1.)

Thereafter, there ensued the discussion upon which the appellant Interstate Commerce Commission relies so heavily. Believing that the court will more readily appreciate the issues involved from a reading of the entire discussion rather than from scattered quotations, we have reproduced it in its entirety as Appendix A of this brief.

An examination of this material will reveal that throughout, the witness was contending for the inclusion in the act of mandatory language providing that in no case of consolidation or abandonment should any employee be displaced but that all should be absorbed by the carrier or carriers involved pending reduction of working forces through natural and normal attrition. The Chairman, on the other hand, contended that such a limitation was wholly impracticable, particularly in connection with abandonments.

It is true that, in the course of the discussion, the witness (not Chairman Wheeler) referred in passing to a "discretionary power in the Commission." (See p. 403 of the Senate Hearings (Appendix A, p. 6) and cf. p. 20 of the brief of the I. C. C.) It is not clear whether the reference was to the power of the Commission generally in consolidation or abandonment cases, or to a more specialized power to protect employees in such cases. The full quotation reads as follows:

"I am asking—if you put discretionary power in the Commission—that you make it broad enough to take care of these conditions; which we think merit consideration by the Commission. You are not imposing any *obligation* on them." (Emphasis supplied.) (Appendix A, p. 6.)

The whole purport of this statement is clear. While the witness used the word "discretionary," his objection to the bill was stated to be that it imposed no "obligation" upon the Commission. Hence, it is clear that his proposal did not contemplate any truly discretionary power.

This proposal of Mr. McGrath was attacked by the Committee not because of the inclusion of abandonments therein, but because of its mandatory requirement that no employee should be displaced—a requirement which they appeared to consider unworkable as to either abandonments or consolidations. It is true that certain remarks were made directed primarily to the abandonment question but it is perfectly clear that it was the scope of the protection proposed to which the Committee objected and not the nature of the transaction to which its application was suggested. Thus, the general question of employee protection in abandonment cases was not raised in this discussion, either expressly or by necessary implication.

*The Original  
Harrington  
Amendment*

as follows:

S. 2009 was passed by the House of Representatives only after drastic amendments had been made. The amended section dealing with the protection of employees, reads

"(e) No consolidation, merger, purchase, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result

in an increase of total fixed charges on funded debt, ~~except upon a specific finding by the Commission that such an increase in a particular case would not be contrary to public interest.~~ The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected: *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*"

The italicized portion of the above quotation is the so-called Harrington Amendment which was offered from the floor by Congressman Harrington and adopted by the House of Representatives.

It will be noted that this was the first departure from the original recommendation of the Committee of Six as to the measure of protection to be accorded to employees. The Amendment sought to permanently prohibit the displacement of employees as a result of consolidations. Had the Amendment been adopted as a part of the finally enacted statute, consolidations could have been effected thereunder, but it would have been necessary to keep all employees of the consolidating carriers on the payroll until such time as the normal attrition of the force reduced the number to the level needed for a permanent working force. This is substantially the same suggestion as that made by the witness McGrath and noted above. Regardless of the merits or demerits of this proposal, it is clear that it encountered widespread opposition. The Interstate Commerce Commission sent a special communication to Congress condemning the principle of the Harrington Amendment in the following language:



"The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

Certainly this Amendment affords no basis for a contention that the abandonment question was raised in Congress during these legislative developments, for it contains no mention of abandonments. The Amendment is significant, however, for our purpose in that it shows again that the controversy regarding employee protection centered about the measure of that protection rather than the field in which it was to be operative.

**Harrington Bill.** S. 2009 went to conference committee on July 29, 1939, and was reported out on April 26, 1940, with the Harrington Amendment completely eliminated. On the same day, Mr. Harrington introduced in the House a bill known as H. R. 9563, reading as follows:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division of traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting *abandonments* under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads in-

involved in such transaction, or in the impairment of existing employment rights of said employees." (Emphasis supplied.)

This is the first instance when the word "abandonment" was inserted into any of the legislative efforts to protect employees, and it will be noted that the bill contains the same mandatory provisions with respect to displacement of employees as those subsequently rejected by Congress in the amendment to the consolidation section of the Act. It is the first official record of its use by anyone connected with this whole situation since the exchange of remarks between Mr. McGrath and Mr. Wheeler during the Senate hearings over a year before.

As far as we have been able to learn, H. R. 9563 died a peaceful death in the House of Representatives without any action taken thereon by that body.

*Modified Harrington Amendment.* The House of Representatives, however, refused to accept S. 2009 as reported out of conference committee with the Harrington Amendment eliminated as above noted, and on May 9, 1940, voted to recommit the bill. At this time, the House proposed protection for employees on lines differing somewhat from those set out in the original Harrington Amendment. Its suggestion was that the Interstate Commerce Commission include in any order authorizing the consummation of certain transactions:

"terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment."

Among the "transactions" listed as subject to this provision was "the substitution and use of another means of transportation for rail transportation proposed to be aban-

doned." This proposal is noteworthy for two reasons from our point of view: First, it was not to be applicable to *abandonments as such*, nor would it be effective in abandonment proceedings brought under Section 1 (18-20) of the Interstate Commerce Act. Its coverage was limited to cases where railroad companies might seek permission to institute a new transportation service in substitution for abandoned rail service. Second, it contemplated the absolute maintenance of employment at the same level as before the "transaction" in question until normal attrition should reduce the force. This last was the same proposal as to the measure of employee protection as that to which the Senate Committee, the conference committee and the Interstate Commerce Commission had already objected.

The conference committee did not adopt the House suggestion, nor did it entirely eliminate the Harrington Amendment from the measure but reported a compromise arrangement which was approved by House and Senate and forms a part of the present Act. The provision as actually adopted reads as follows:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Transportation Act of 1940, Sec. 7(2) (f).)

The transactions referred to did not include abandonments, but did include consolidations, combinations, etc.\*

As already noted, the appellants have taken the position that the abandonment question was before Congress, that Congress took no action to amend the existing law in that regard, and that therefore it is to be presumed that Congress approved the interpretation theretofore placed on the abandonment provisions by the Commission, i. e., that the Commission has no authority to protect employees in such cases. We have analyzed the various legislative developments prior to the amendment, and have found that neither the general question of abandonments, the more specific question of protection of employees in abandonments, nor the technical question of the authority of the Commission to require such protection, was placed before Congress in any emphatic way.<sup>A</sup>

What significance in this connection have the developments centering around the Harrington Amendment? In the first place, it is to be noted that the original Harrington Amendment contained no reference to abandonments and therefore it does not support the defendant's contention. In the second place, as already developed, the second form of the Harrington Amendment was not designed to be effective.

\*The coverage of para. (2) is set up in para. (a) (i) and (ii) which read as follows:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

tive in connection with applications for abandonments but in connection with applications of railroad companies for authority to inaugurate substituted service in place of the abandoned rail service. This is an important distinction, for the Amendment, as proposed, would in no sense have been an amendment of Section 1 (18-20) of the Interstate Commerce Act and would not have been controlling upon the Commission's authority thereunder. Hence, the introduction of this Amendment did not raise for congressional deliberation the question of abandonments generally or that of the Commission's authority to protect employees.

The Harrington Bill (pp. 22-23 above) does contain, of course, a clear-cut statement of policy with relation to abandonments, which if it had been adopted, would have accomplished a real modification in the Commission's powers under Section 1 (18-20). We submit, however, that this bill cannot be relied upon as a measure which actually laid this matter before Congress. On the day when it was introduced, a conference committee had reported S. 2009 back to the Houses of Congress with the original Harrington Amendment eliminated. It was obviously a matter of good legislative tactics to then introduce a separate bill incorporating all of the features of the eliminated amendment and more. It will be noted that the House of Representatives refused to take the bill seriously. It took no action upon it and when it voted to recommit S. 2009, its suggestion as to employees' protection followed entirely different lines and contained no mention of abandonments.

It would certainly be an unusual situation if the mere introduction of a bill upon which no action was taken either favorable or unfavorable could be held to constitute a ratification by Congress of all administrative rulings in the construction of existing laws which were contrary to the tenor of the bill.



Accordingly, we conclude that no phase of the controversy over the Harrington Amendment was sufficient to actually place the Congress upon notice of the existence of any question as to the extent of the Commission's authority to protect employees under Section 1 (18-20).

The appellant, Interstate Commerce Commission, has also discussed the above developments in its brief and has supplemented them by extensive quotations from members of the Senate and House of Representatives made during the course of debates. We have examined these quotations with interest and have found nothing except that which is merely supplemental of matters already discussed.

It appears throughout that the controversy over employee protection centered about the extent of that protection and the manner in which it was to be imposed. All proposals agreed that henceforth it should be mandatory upon the Commission to consider employees' interests in consolidation cases. A divergence of views developed, however, on the question of whether the measure of protection was to be left to the Commission's judgment of what was fair and equitable under the circumstances, or whether, on the other hand, the statute should require that no employee was to be deprived of employment as a result of such a consolidation. As a mere incident to this important major issue, the abandonment question made three fleeting appearances on the stage: once in the McGrath testimony, once in the Harrington bill, and once in the revised Harrington amendment, where it was limited, however, to situations in which authority was sought to institute substituted service in lieu of rail service to be abandoned. When all of these instances and all comments concerning them are assembled between the covers of one brief, they may be made to assume an impressive appearance, but when viewed accurately as isolated fragments of a year and a half of legis-

lative history or as paragraphs in a record covering thousands of pages, they are insignificant. During the course of these proceedings, no separate and independent proposal was ever made as to the protection of employees adversely affected by rail abandonments. Always the proposition was that the measure of protection in consolidation cases was to be thus and so, and, as an incidental feature, it was occasionally proposed that the same measure should be extended to abandonments. Always the opposition which developed to such proposals was directed to their mandatory features wherein they required the Commission to provide in its orders that no employee should lose his employment as a result of the transaction to which the Commission gave its approval. This objection was somewhat more vigorously stated in relation to abandonments because some abandonments amount to a complete dissolution of the carrier and the proposed standard was thought by some to be impossible. Never was a proposal made that discretionary power should be vested in the Commission in relation to abandonments nor was this question made the subject of debate. That issue was never raised during the course of the legislative proceedings.

In regard to the whole legislative attitude during the period of the years 1935 to 1940, therefore, it appears that Congress knew from the reports of the Commission made to it in 1935 and 1936 that the Commission entertained doubts as to its jurisdiction to protect employees in relation to certain transactions where its consideration was limited to factors of "public interest" and "public convenience and necessity" respectively. The appellants also presume knowledge on the part of Congress of the course of the Commission's opinions with reference to Section 1(20) and its administrative construction of that portion of the statute.

If such a presumption can be fairly made, it is equally fair to presume that Congress was aware of the decisions rendered by the Commission under Section 5(4) of the Interstate Commerce Act and of the nature of those decisions. Such a presumption necessarily includes a further presumption of Congressional knowledge of the fact that the Commission had proceeded to extend protection to employees under this section with considerable hesitation and contrary to the judgment of a substantial number of its own members, and that it had predicated its decisions to a large extent on the ground of an assumed increase of its powers because of the presence of the phrase "just and reasonable" in Section 5(4) rather than upon the ground that employee protection might be considered as a phase of the public interest.

If the Congress is to be presumed to be aware of administrative opinions, it must surely be presumed to know of the decisions of this court including that rendered by it in the *Lowden* case. It will be recalled that the Commission in its Annual Reports for 1935 and 1936 had expressed a *joint doubt* of its authority to properly protect employees in the course of its consideration of issues of either "public interest" or "public convenience and necessity." It is not unreasonable to suppose, therefore, that Congress may have considered the *Lowden* case, as a *joint disposition* of the doubts which the Commission had jointly expressed in its Annual reports and which had constantly plagued it in the course of its decisions under both sections. Under such circumstances, the Congress could logically have made mandatory the protection theretofore available to employees subject to the Commission's discretion under Section 5(4), and still have left Section 1(20) unchanged in the belief that a discretionary protection was already afforded by that section under the doctrine of the *Lowden* case, which protec-

tion it did not desire to make mandatory because of the varying fact situations presented by various types of abandonment cases.

If any presumption at all can be drawn from the fragmentary evidence of Congressional intent available from the record of the proceedings of that body, certainly the one developed above is at least as logical as that advanced by the appellants.

We know of no better summary as to this whole section of the brief than that supplied by the opinion of the court below. The fact that the court carefully considered this question is demonstrated by its request that supplemental briefs be filed by the parties on this issue. After exhaustive briefs had been prepared and supplied, and the court had given its consideration to the question, it stated its conclusion thus:

"It appears that a few comments were made in debate, and some discussion, none too clear, was had in the committee hearings, upon the protection of employees in abandonment cases. Later a bill was introduced to require the Commission in abandonment cases to impose conditions prohibiting the displacement of employees. This bill apparently never came to a vote. These discussions resulted only in the enactment of a provision *requiring* a 'fair and equitable arrangement' to protect employees in consolidation cases and other more specific provisions therefor. All the proposals leading to this result similarly dealt with mandatory provisions. We think this legislative history, therefore, can throw little light on the extent of the discretionary authority since 1920 to impose conditions under Section 1(20). Indeed, we think the interpretation so clear that resort to such extraneous matters is unnecessary." (38 F. Supp. 818, 823.) (R. 65.)

## CONCLUSION

In conclusion we submit to the court:

*First*, that no reasonable distinction can be drawn between the language of Section 1(18-20) of the Interstate Commerce Act and that of Section 5(4) as the latter section read prior to its recent amendment, or between the powers conferred by the two sections upon the Commission. The phrases "public interest" and "public convenience and necessity" are indistinguishable in meaning. Both contemplate that the Commission in making its administrative decisions shall be guided by considerations of public welfare. The Commission, therefore, has as complete authority to protect employee interests under the one section of the statute as it has had under the other.

*Second*, that the administrative decisions of the Commission construing the extent of its jurisdiction under Section 1(18-20) have been so clearly erroneous, so far from contemporaneous, of such short duration, and are so far removed from the technical field wherein the Commission may be presumed to move with peculiar ability that they are of little weight. Furthermore, the reversal of these decisions at this time will be injurious to no one.

*Third*, that the legislative history of the Transportation Act of 1940 is one of a conflict over issues essentially far removed from those involved in this case, and that occasional fragmentary references to the problem of abandonments are not conclusive as to the existence of legislative intent to deprive employees of protection in abandonment cases or of a passive acceptance or ratification of the administrative decisions rendered by the Commission.

In light of the foregoing, therefore, we respectfully



submit that the decision of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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## APPENDIX A

Testimony of Mr. McGrath. Senate Hearings,  
Pages 402-404, Inclusive

The Chairman:

But we are not amending the law.

Mr. McGrath:

You are not amending the particular section. I say this particular section 49 should carry with it, as a corollary, an agreement of provision protecting the men against loss of jobs in cases of consolidations and mergers. If they are entitled to that in one case, I think they are entitled to it in another; and the same thing is true with respect to abandonments.

The Chairman:

This provision with reference to pooling has been on the statute books for how long a period? Can you tell me that, Mr. Fort?

Mr. Fort:

Since the first, I think, Senator.

The Chairman:

Since when?

Mr. Fort:

Since 1887 or 1889, I think.

Senator Reed:

Certainly since 1920.

Mr. Fort:

Oh, long before that.

Mr. McGrath:

That does not make a case.

The Chairman:

Except it is the first time that your organization or anybody else has ever intimated that there should be written into the law any provision such as you are suggesting at the present time.

Mr. McGrath:

Well, Senator, the evolution of the treatment of railroad employees of course has been going on, legislatively, for 50 years. During that course of time there have been mergers and consolidations; and we had no way of protecting ourselves until we got this agreement; until this agreement was obtained, we

had nothing in concrete form. Before that time, why, we were able to get some concessions through collective bargaining, at times; but now Congress is going to write a new policy with respect to the treatment of labor.

The Chairman:

Oh, no; we are not. We are not changing in the slightest degree the policy with respect to labor or with respect to pooling.

Mr. McGrath:

I am not talking about pooling, particularly.

The Chairman:

And we are not changing the policy with respect to anything else. All we are trying to do is to put it that in the event that there is a consolidation, then labor must be taken care of.

Now, so far as your statement that we are changing the policy: We are changing it in favor of labor and to help labor.

Mr. McGrath:

Well, Mr. Chairman, your very statement coincides with mine, although we may not have stated it in the same way. Up to the present time, there is nothing in the law that requires the Commission to consider the interests of labor at all. Now you are going to put that in. I say that, to that extent, you are changing the legislative policy. When you say that the Commission must of necessity consider the interests of labor, then all I am saying is that if they must consider the interests of labor in consolidations and mergers, they should also consider the interests of labor where there is pooling of traffic. That is the only point. Also I say that if they are going to consider it in that connection, they should consider it where there is an abandonment of facilities.

The Chairman:

But, Mr. McGrath, just stop and ask yourself this question: When a railroad company says to us, "Here is a piece of track, out here, that is not making any money and there is no traffic on it, and we want to abandon it, because there is no freight to be hauled over it," then what are we going to say to

them? Are we going to say, "You have to employ these men, whether there is any traffic there or not?"

As a matter of fact, suppose the Baltimore & Ohio Railroad line between here and New York could not get any traffic and could not employ any men: Would you say that we should write into the law a provision which would result in our saying to the Baltimore & Ohio Railroad, under those conditions, "You have to employ as many men, whether you have any traffic or not; and if you have no traffic, you must abandon it"? How can you do that?

Mr. McGrath:

I am not saying you should go that far, Senator.  
The Chairman:

Well, take as an illustration the branch line running from Billings, Montana, up to Red Lodge: There used to be a lot of traffic over that branch; there was coal being shipped, and there was a great deal of traffic. Then the Northern Pacific began to get its coal at another place. Thereafter, there was no traffic on the Billings-Red Lodge branch; it was more or less idle; and finally they abandoned it and put on some buses; there was not money enough, if they are going to keep that up, when there is no traffic over it, it seems to me they are going to break down their whole labor structure—much more than by laying off a few men. Because if they do not, the whole financial structure of the railroads is going to break down; and if that does happen and the railroads cannot make any money at all, then what is going to happen to labor?

In other words, you cannot put impossible burdens on railroads and still have them pay wages to labor; that cannot be done.

Mr. McGrath:

I understand that. However, I say that if the Commission has the power to put on those restrictions with respect to the men, in occasions of consolidation and merger, that would take care of it. I say that if, under this bill, you are going to give them such power, then let them have it with respect to the abandonments as well as mergers.

The Chairman:

What could they require in cases of abandonment?

Mr. McGrath:

I do not know. They might require the employment of men on other positions with the railroad.

The Chairman:

If the railroad has other positions for them, of course, the railroad is not going to throw them out; but you cannot ask the railroads to make positions when there is not any business.

Senator Reed:

Mr. McGrath, you know very well, do you not, that any trainman or engineman employed on a branch line that happens to be abandoned, retains his seniority on the division to which that abandoned line belongs, and takes rank in employment and continues in employment in accordance with his seniority?

Mr. McGrath:

If he has seniority on the main line. But he may have seniority only on the branch line. We have many of those cases, and I can cite some tragic ones to you, where branch lines have been abandoned.

The Chairman:

Then perhaps you are going to say, "We have some section men working up here on the line. We have no place for them; but we must make a place for them and keep them working."

You cannot do that.

Mr. McGrath:

I am not asking that. I am asking—if you put discretionary power in the Commission—that you make it broad enough to take care of these conditions, which we think merit consideration by the Commission. You are not imposing any obligation on them.

The Chairman:

Mr. McGrath, let me say to you that this committee has always gone just as far and a lot further than a great many people in this country think it should go; but, in the interests of labor, itself, we cannot go so far as to say to them, "If you are going to abandon a line of railroad, the Interstate Commerce Commission has got to keep these men working."



**Mr. McGrath:**

I do not ask you to say that; but I am not going to quibble with you over that question.

**The Chairman:**

Candidly, I think what you are suggesting with reference to that is not in the interests of labor. I think it would be very injurious to labor in the long run.

**Mr. McGrath:**

That is, you mean if we were to insist that these men should be retained?

**The Chairman:**

If you write in the same provisions, and you have the Washington Agreement, that is what it would mean with reference to abandonments,

**Mr. McGrath:**

No; the Washington Agreement does not cover abandonments.

**The Chairman:**

No; but I say if you would have the similar provisions in the law, and then have this Washington Agreement, then you would say to the railroads, "You ought to keep these people, regardless of whether you have any work for them."

**Mr. McGrath:**

Oh, no, Mr. Chairman. You may not understand the Washington Agreement. The Washington Agreement means that the men laid off shall be paid a certain proportion of their wages, for a length of time dependent upon the length of time they have been in the service.

**The Chairman:**

When you drew up the Washington Agreement, why did you not provide in there the provisions for abandonments and other things that you are asking the committee to do?

**Mr. McGrath:**

Now, Mr. Chairman, what about this proposition? Suppose a merger has taken place; there is no disclosure of proposed abandonment of facilities in that instance. It may be a freight house or a yard or something of that sort. As soon as it is approved and perfected and the abandonment is made, the men

get no consideration, under this law. I believe that is something to consider.

The Chairman:

I do not agree with you. When there is a consolidation, I think they take into consideration exactly what is going to take place and how many men they are going to lay off, and then they come under the Washington Agreement.

Mr. McGrath:

The Commission has lost its jurisdiction over it when it has approved a merger or consolidation.

Now, in the case of the changing of facilities or the abandonment of a freight house, we shall say, they do not have to go to the Commission to get permission for that.

The Chairman:

I appreciate that.

Mr. McGrath:

But they may have intended to do that all the time; and the men lose out.

So much for that.

# SUPREME COURT OF THE UNITED STATES.

No. 223.—OCTOBER TERM, 1941.

Interstate Commerce Commission, and  
the Pacific Electric Railway Com-  
pany, Appellants,

vs.

Railway Labor Executives Association  
and Brotherhood of Railroad Train-  
men.

On Appeal from the Dis-  
trict Court of the United  
States for the District  
of Columbia.

[March 2, 1942.]

Mr. Justice BLACK delivered the opinion of the Court.

The appellant, Pacific Electric Railway Company, owns and operates electric railroads and motor bus and truck lines in California. It is a wholly owned subsidiary of the Southern Pacific Railroad Company with whose lines it makes connections at numerous points. It applied to the Interstate Commerce Commission for permission to carry out "a general program of rearrangement of . . . passenger service, involving abandonment of certain rail lines and substitution of motor coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public." The Railway Labor Executives' Association and The Brotherhood of Railroad Trainmen appeared before the Commission as representatives of Pacific's employees. They contended that if the Commission were to grant Pacific's application, it should do so only upon conditions designed to protect employees, and proposed that Pacific be required to provide certain specified benefits for employees who would be displaced or otherwise prejudiced by the abandonment. In support of this contention, they argued that many of Pacific's employees had devoted a large part of their lives to the service of the railroad and had acquired valuable rights of seniority in connection with their employment; that the proposed change would cause many of them to lose their jobs as a result of which they would suffer great hardships and some would be-

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come public charges; and that although the abandonment and rearrangement would give Pacific a net annual savings of approximately \$378,000, about \$302,000 of the saving would be due to a net wage loss suffered by employees. After a hearing, Division 4 of the Commission issued an order permitting abandonment upon the ground that continued operation of the line by Pacific "would impose an undue burden upon the applicant and upon interstate commerce," but held that the Commission was without statutory authority to impose any conditions whatever for the protection of employees in these proceedings. 242 I. C. C. 9. The full Commission denied the brotherhood's request for rehearing. Upon application of the brotherhoods, the Federal District Court of the District of Columbia, composed of three judges, in accordance with 28 U. S. C. § 47, held that the Commission did have authority to impose conditions for the protection of displaced employees. Accordingly, it set aside "That part of the Commission's report which denies consideration of the employees' petition for lack of power . . . with directions to the Commission to consider the petition and take such action thereon as in the discretion of the Commission is proper." 38 F. Supp. 818, 824. Whether it is within the Commission's power in abandonment proceedings to impose conditions for the protection of employees is the single question presented by this appeal.

Section 1(18) of the Interstate Commerce Act provides that "no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." And Section 1(20) empowers the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1(18)-(20).

With respect to consolidations, another section of the Act, 5(4), is controlling. In *United States v. Lowden*, 308 U. S. 255, this Court held that the Commission has authority under Section 5(4) to impose conditions similar to those sought here in order to protect employees adversely affected by a consolidation. At the time of the *Lowden* case, Section 5(4) provided: "If the Commission finds that subject to such terms and conditions and such modification

*Railway Labor Executives Association et al.*

as it shall find to be just and reasonable, the proposed consolidation . . . will promote the public interest, it may enter an order approving and authorizing such consolidation upon the terms and conditions, and with the modifications so found to be just and reasonable." 49 U. S. C. § 5(4).

The Commission argues that the conditions it is authorized to impose under the consolidation section—"just and reasonable" conditions, which "will promote the public interest"—are of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which "the public convenience and necessity may require." Although admitting that provisions for the protection of displaced employees may be a condition that "will promote the public interest", the Commission concludes that such provisions cannot be required by "the public convenience and necessity." We need not decide in what respects, if any, the authorization to impose conditions in consolidations is broader than the authorization to impose conditions in abandonments. For even assuming that the language of the abandonment section is narrower, we cannot agree that it excludes all power to impose conditions of the kind sought here.

The phrase "public convenience and necessity" no less than the phrase "public interest" must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system. *New England Divisions Case*, 261 U. S. 184, 189-191. Clear recognition that "public convenience and necessity" includes the consideration of effects on the national transportation system of a proposed abandonment appears in the decision of this Court in *Colorado v. United States*, 271 U. S. 153. There, Mr. Justice Brandeis, although stating that "public convenience and necessity" was the sole criterion for determining whether or not an abandonment should be allowed, nevertheless considered the effect of the proposed abandonment in a much broader sphere than the immediate locality and population served by the trackage to be abandoned. See also *Transit Commission v. United States*, 284 U. S. 360. And if national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded.



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*Railway Labor Executives Association et al.*

On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of "public convenience and necessity", an exclusion inconsistent with the Act as this Court has interpreted it, that the distinction made by the Commission can be maintained.

It was not until 1935, fifteen years after the passage of Section 1(20), that the Commission first decided that it was without power to impose conditions for the protection of workers in an abandonment. *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315, 322. At that time the Commission took the position that requiring displacement allowances as a condition would be the equivalent of granting a private benefit to a particular group of workers, and therefore beyond the scope of authority granted by Congress. The Commission has taken the same position here. It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services. The justification lies in the benefit to the transportation system which the Commission concluded the abandonment would produce. There is nothing in the Act to prevent the Commission from taking action in furtherance of the "public convenience and necessity" merely because the total impact of that action will include benefits to private persons, either carriers or employees. The *Lowden* case specifically recognized that the imposition of conditions similar to those sought here might strengthen the national system through their effect on the morale and stability of railway workers generally. Exactly the same considerations of national importance are applicable and operative here.

We must also reject the further argument that Congress has ratified the Commission's construction of Section 1(18)-(20). It is true that Congress made no changes in Section 1(18)-(20) of the Interstate Commerce Act in passing the Transportation Act of 1940, and that the annual reports of the Commission to Congress in 1935 and 1936 had specifically asked "for further statutory provi-

sions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications." But the *Lowden* case, clearly establishing that the Commission's 1935 and 1936 doubts about its powers with respect to unifications were erroneous, was decided on December 4, 1939. Congress could with good reason have concluded that the principle of the *Lowden* case was equally applicable to abandonments. In any event, the contrary conclusion—that abandonments were now to be distinguished although the Commission had made no such distinction in presenting the problem to Congress and that Congress approved such a distinction—is at best the product of a set of inferences none of which is free from doubt. We therefore cannot impute to Congress's failure to amend Section 1(18)-(20) the significance which the petitioners contend it should have.

Nor is the petitioners' contention strengthened because Congress did modify Section 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary.<sup>1</sup> See *Lowden v. United States*, *supra*, 239. To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly.

The petitioners have made further arguments based on the statutory history of the Transportation Act of 1940, relying upon

<sup>1</sup> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 54 Stat. 906-907.

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*Railway Labor Executives Association et al.*

incidental and sporadic references in committee hearings and reports to the protection of labor in connection with abandonments. We have reviewed those references, and have found that they raise inferences too ambiguous to support the conclusion that Congress has ratified the Commission's construction of Section 1(18)-(20).

It is also urged that we should not disturb the Commission's construction of the abandonment provisions for the reason that administrative interpretations by the agency charged with the enforcement of a statute are entitled to great weight. But as we have pointed out, the construction placed upon Section 1(18)-(20) by the Commission is not only hostile to the major objective of the Act and inconsistent with decisions of this Court, but irreconcilable with its own interpretations of Section 5(4). Under such circumstances, we believe the court below was amply justified in refusing to accept the Commission's construction. Cf. *Mitchell v. United States*, 313 U. S. 80; *City Bank Co. v. Helvering*, 313 U. S. 121.

We therefore conclude that the Commission has authority to attach terms and conditions for the benefit of employees displaced by railroad abandonments. Whether such terms and conditions should be attached in this case and if so their nature and extent are questions for the Commission to decide in the light of the evidence. The judgment of the court below should accordingly be

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*